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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS BOOKER and FRANK HUMPHREY,
Petitioners,
vs.
GEORGE THOMAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether grossly negligent or reckless conduct by prison guards and their supervisors, in failing to prevent an assault on one pretrial prisoner by another, gives rise to an action under 42 U.S.C. §1983, in light of state tort law remedies which are both adequate in theory and available in practice and absent evidence that the guards' conduct was the product of a governmental policy or custom?

2. Whether *Moore v. Pape* should be reconsidered in light of *Parratt v. Taylor, Monell v. Dept. of Social Services, and Harlow v. Fitzgerald,* so as to limit the application of 42 U.S.C. §1983 to those cases in which injuries of constitutional dimension are intentionally caused by actions of state officers pursuant to a clearly unconstitutional governmental policy or custom?

3. Whether, in an action under 42 U.S.C. §1983 by a pretrial prisoner against guards and their supervisors, arising out of an assault on the prisoner by another prisoner, and predicated on a theory of deprivation of liberty without due process, evidence of gross negligence or recklessness, or other conduct less than intentional, is sufficient to support a jury's verdict against the guards or supervisors, in light of the discretion inhering in prison officials in managing such institutions?

4. Whether, and under what circumstances, in an action under 42 U.S.C. §1983 predicated on gross negligence or reckless conduct of the defendants, the trial court is authorized to set aside a jury's verdict awarding punitive damages, based on insufficient evidence to warrant the award of such damages?

5. Whether, in evaluating claims for attorney's fees under 42 U.S.C. §1988, the amount the plaintiff is contractually obligated to pay under a contingent fee contract between the

plaintiff and his attorney should be treated as the "lodestar" or the upper limit on the fee award?

6. Whether 28 U.S.C. §636(c) (1979) is constitutional?

PARTIES BELOW

The parties in the proceedings in the Court of Appeals were George Thomas, plaintiff, and Thomas Booker, Alfonso Lark, and Frank Humphrey, defendants. Defendants were employees of the City of St. Louis, Missouri (not a party below). No other parties have a financial interest in the outcome of these proceedings.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Come now Thomas Booker and Frank Humphrey, petitioners herein, and respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on February 14, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, *en banc,* was filed February 14, 1986, and is not yet reported. The panel opinion of the Court of Appeals, filed July 11, 1985, is reported at 762 F.2d 654. The opinions and orders of the U.S. Magistrate are not reported. All pertinent opinions and orders are reproduced in the appendix.

JURISDICTION

The panel opinion of the Court of Appeals, as noted above, was filed July 11, 1985. Timely petitions for rehearing were filed by the parties. On August 7, 1985, the Court of Appeals, on its own motion, ordered rehearing *en banc*. (A copy of this order is reproduced in the appendix.) On February 14, 1986, the Court of Appeals filed its opinion and judgment. This petition is filed within ninety days of that date. 28 U.S.C. §2101. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amdt. XIV provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection ofnthe laws.

Section 1 of the Civil Rights Act of 1871 (the "Ku Klux Klan Act"), 17 Stat. 13, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Other pertinent constitutional and statutory provisions, namely U.S. Const. art. III, §1, U.S. Const. amend. VII, 28 U.S.C. §636(c) and 42 U.S.C. §1988, are set forth in the appendix.

STATEMENT OF THE CASE

This action originated in 1981 with the filing of a complaint by respondent George Thomas, alleging claims arising under 42 U.S.C. §1983. Jurisdiction in the District Court was predicated on 28 U.S.C. §1343. Unless otherwise noted, the facts stated herein are drawn from the opinions of the magistrate and the opinions of the Court of Appeals. References are to the opinions and other documents reproduced in the appendix.

During 1980, respondent Thomas was a pretrial prisoner confined in the St. Louis City Jail. Petitioner Thomas Booker was chief of security at the jail at the time, and petitioner Humphrey was a floor guard. Prior to September, 1980, Thomas complained to Booker on several occasions that he did not wish to be placed in the general population of the jail, because he feared harm from other unidentified prisoners. Booker rejected Thomas's requests to be placed on segregated status. The exchanges between Thomas and Booker bespoke irritation on Booker's part. However, Thomas spent at least six months in the jail, including several months assigned to tier 5-1 (general population), without incident. Appendix pp. A-2-3.

On September 17, 1980, respondent Thomas was assaulted without warning by another prisoner, who rushed into his cell, struck him, and rushed out. Thomas was treated for an eye injury and returned to the same tier on orders of another supervisor. Later, Booker learned of the incident, and Thomas asked to be removed from the tier, claiming that another inmate, Franklin Parker, was a threat to him. Appendix p. A-3. Booker refused, noting that the inmate who had assaulted Thomas on the 17the had been removed from the jail. On September 22, a fight broke out between Thomas and still another inmate, Gillian. This fight was instigated by inmate Parker, and lasted noisily for at least forty-five minutes. *Id.*, A-4. No gurards appeared until the end of the fight. For at least part of this time, petitioner Humphrey was away from the floor, performing an

assignment. *Id.*, A-4-5. Both Thomas and Gillian sustained injuries, Gillian a broken hand, Thomas another eye injury. Thomas was hospitalized, but permanently lost sight in the injured eye. *Id.*, A-2.

The case was assigned to a United States magistrate with the consent of the parties, pursuant to 28 U.S.C. §636(c), and tried to a jury in 1983. At trial, the evidence was sharply controverted. However, no evidence was adduced that inmate Parker had a history of violence toward other prisoners, nor did it appear that the assignment of respondent Thomas to the general population was inconsistent with the jail's system of prisoner classification. Appendix p. A-2. The jury was instructed that petitioners Booker and Humphrey (and their codefendant Lark, an intermediate supervisor) could be found liable under 42 U.S.C. §1983 for "gross negligence," defined as a "remarkably bad failure to protect" Thomas. *Id.*, A-7-8. This was the only theory of liability submitted to the jury.

The jury initially returned a verdict against petitioner Booker only, having previously inquired whether punitive damages alone could be awarded. Appendix, p. A-5. Upon being told that the verdict was incomplete, the jury were returned to their deliberations. Subsequently, the jury returned another verdict, in which the $5,000 actual and $20,000 punitive damages against Booker had been scratched out, and redistributed among verdicts against Booker, Lark and Humphrey. *Id.*, A-6.

Petitioners filed motions for judgment notwithstanding the verdict and for a new trial, asserting, *inter alia,* insufficient evidence to support the verdicts. Respondent Thomas filed a motion for the award of attorney's fees. In ruling on these motions, the magistrate held that the verdicts awarding punitive damages against Lark and petitioner Humphrey were not supported by the evidence, and the verdict against Booker was "barely supported." Accordingly, he set aside the punitive awards against Lark and Humphrey. Appendix p. A-47. The

magistrate rejected petitioners' contention that the contingent fee contract between respondent Thomas and his counsel operated to limit the award of fees, and granted Thomas a fee of $15,000. *Id.*, A-53. A subsequent defense motion under Rule 60(b), F.R.Civ.P., questioning the magistrate's jurisdiction was also denied. *Id.*, A-54.

On appeal, a panel of the Court of Appeals reversed the judgment against Lark and Humphrey, remanding the case against the latter for a new trial on the basis of the jury's evident confusion in returning its verdicts. Appendix pp. A-42-43. The panel held that the jury instructions on the standard of liability, premised on a theory of foreseeability and gross negligence, see appendix pp. A-32-35, were not prejudicially erroneous. The panel held that the evidence was sufficient to establish petitioner Booker's liability for actual and punitive damages, acknowledging the closeness of the case, and affirmed the judgment against Booker with the condition that respondent Thomas could elect to have new trial avainst Booker by reason of the jury's confusion. *Id.*, A-42-43. No mention was made of the issue of prison authorities' discretion.

Both sides petitioned for rehearing in the Court of Appeals. The Court denied the parties' petitions, but granted rehearing *en banc* on its own motion, evidently intending to address what it conceived to be the erroneous apportionment of damages among the defendants by the jury. See appendix p. A-28. On rehearing, petitioners raised the issue of the viability of respondent's case in light of the adequate and available state remedies for failure of prison guards to keep their charges safely. *Id.*, A-23. The Court of Appeals *en banc* decided it could not reach the apportionment issue, and instead overruled the panel's disposition of the case as to petitioner Humphrey, reinstating the punitive award against him and affirming outright the judgment against petitioner Booker. The Court *en banc* simply treated the magistrate's findings concerning the jury's confusion as superfluous, see appendix p. A-14, and rejected the

panel opinion's view. As to the punitive award against Humphrey, the Court *en banc,* without analysis, held that since "the standard for awarding punitive damages in this case is substantially the same as that for actual damages, the jury's punitive damage award against Humphrey should have been sustained." Appendix p. A-13. Finally, the Court summarily dismissed petitioners' arguments concerning the role of contingent fee contracts under 42 U.S.C. §1988. *Id.,* p. A-17.

Judge Bowman dissented from the judgment of the Court of Appeals *en banc.* He reasoned that *Parratt v. Taylor,* 451 U.S. 527 (1981) controlled the disposition of respondent Thomas's claim, even though that claim was bottomed on a protected liberty interest rather than a property interest, characterizing the claim as one of procedural due process. Appendix p. A-22. Since the conduct of petitioners was not conduct pursuant to an established state policy, and state remedies were both adequate and available to vindicate Thomas's interest, Judge Bowman concluded that Thomas's claim was not cognizable under 42 U.S.C. §1983. *Id.,* p. A-25. He also reiterated his view that the jury verdict was impermissibly tainted by confusion found by the magistrate, and warranting a new trial as petitioner Humphrey, as to actual damages only. *Id.,* A-27.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Introduction

The provision of the Civil Rights Act of 1871, now 42 U.S.C. §1983, which drew the least attention in the debates in the 42d Congress, has proved a fertile field for the growth of litigation in the federal courts. Compare Administrative Office of the United States Courts, 1978 Annual Report, pp. 75-77 with *idem*, 1984 Annual Report, pp. 133, 143, 145. Although the two essential elements of an action under 42 U.S.C. §1983 are deceptively simple to state: (1) deprivation of a federally protected right (2) by a person acting under color of state law, see, e.g., *Addickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), the statute's operation was deemed relatively narrow until 1961, when this Court redefined "color of law" to embrace a host of illegal actions by state officers. *Monroe v. Pape*, 365 U.S. 167 (1961). Recently, the "color of law" requirement has been deemed satisfied if private persons invoke an unconstitutional state law and cooperate with state officers in enforcing it, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and the term "person" has been expanded to include municipal corporations, but the nature of municipal conduct entailing municipal liability has yet to be defined. *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978); *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427 (1985). Withal, certain "deprivations" have been held not to rise to the level of a "constitutional" tort, or have been held not entail a deprivation of a federally protected right, or have been such that the state actors are immune from liability. *Daniels v. Williams*, 106 S.Ct. 662 (1986); *Hudson v. Palmer*, 104 S.Ct. 3194 (1984); *Davis v. Scherer*, 104 S.Ct. 3012 (1984).

The result in *Monroe v. Pape, supra,* was perceived by members of this Court to be at variance with the intent of the 42d Congress at the time when the decision was rendered. See dissenting opinion of Frankfurter, J., 365 U.S. 212-20. Even the

majority in *Monroe* perceived only three express purposes of §1983: to override "certain kinds" of state laws; to provide a remedy where state law as *inadequate;* and, most significantly, to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Id.*, 365 U.S. 173-74. Yet this Court's construction of the statute is undoubtedly the foundation for the explosion of litigation in the federal courts. Despite this Court's repeated admonitions, see *Paul v. Davis,* 424 U.S. 693 (1976); cf. *Griffin v. Breckenridge,* 403 U.S. 88 (1971), it is evident from the opinion of the Court of Appeals here that the lower courts have used and will continue to use §1983 as a predicate for the creation of a vast body of "constitutional" tort law. The evolution of the judicial gloss on §1983 since 1961 has now reached the point that a reexamination of first premises is in order, and so much of that gloss as has expanded the application of §1983 beyond the abuses of state power sought to be reached by the 42d Congress should be discarded. Petitioners here submit that the questions presented by this case are of such substantial national importance that their answers should be provided by this Court, after plenary consideration of this case.

1. The proper construction of 42 U.S.C. §1983 requires recognition that it was not intended to reach injurious conduct of state officers, such as prison guards who fail to protect prisoners on isolated occasions, when state remedies for such conduct are adequate in theory and available in practice, and the conduct is not deliberately undertaken pursuant to an established, unconstitutional state policy or custom.

The paradigm of the action under 42 U.S.C. §1983 is a claim such as that advanced in *Adickes v. S. H. Kress & Co., supra,* where the black plaintiffs alleged that they were arrested for trespass when they tried to eat at a "white" lunch counter. The arrest was pursuant to a custom of using the state trespass law to

enforce racial segregation, a custom known and enforced by the state courts. The paradigm of the action which is not cognizable under §1983 is the claim asserted in *Daniels v. Williams,* 106 S.Ct. 662 (1986), in which a claim of a constitutional tort was founded on a prison guard's apparent negligence in leaving a pillow on a stair at the jail. Between these two claims lie myriad claims of greater or lesser abuse of governmental power. To use the terms "reckless" or "grossly negligent" to differentiate among such claims for purposes of asserting federal jurisdiction is manifestly unsatisfactory. Cf. *Daniels v. Williams, supra,* 106 S.Ct. 667 n. 3; *Davidson v. Cannon,* 106 S.Ct. 668, 671, 673 n. 2 (1986) (Blackmun, J., dissenting). The reason that this is unsatisfactory is that the use of such terms causes §1983 to embrace conduct which has no relationship whatsoever to the evils which the statute was intended to remedy—a premise well illustrated by the result reached by the Court of Appeals in this case.

An examination of the legislative history of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act, leads ineluctably to the conclusion that the 42d Congress was obsessed with the organized and deliberate use of the instruments of state government to oppress Republicans and freed slaves, thereby effectively excluding them from the enjoyment of the most basic aspects of liberty. See, e.g., Cong. Globe, 42d Cong., 1st Sess., 319-21 (reference to Klan domination of juries thwarting state criminal prosecutions), 333 (concern expressed about state government fair in form, but dominated by Klan in practice), 334 (Congress' intent to limit its interference with states to the extent of the perceived evil)[1]; cf. Cong. Globe, 39th Cong., 1st

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[1]The remarks of Representative Sheldon are especially revealing:

> Convenience and courtesy to the States suggest a paring use, and never so far as to *supplant* the State authority except in cases of extreme necessity, and *when the State governments criminally refuse or neglect those duties which are imposed upon them.*

Cong. Globe, 42d Cong., 1st Sess., 368 (emphasis added).

Sess., 600 (Senator Trumbull, referring to the Civil Rights Act of 1866: "This bill draws to the Federal Government no power whatever if the States will perform their constitutional obligations.")

Whatever the original understanding of the Fourteenth Amendment, there can be no doubt that it was designed to place a direct, federal constitutional limitation on the power of the states. See *Mitchum v. Foster,* 407 U.S. 225 (1972). The 42d Congress desired to enforce that limitation through the Ku Klux Klan Act, by enacting, in the words of Justice Douglas, a "supplementary" federal remedy, one which would operate when state remedies, adequate in theory, are *unavailable in practice. Monroe v. Pape, supra,* 365 U.S. at 174. In other words, the purpose of §1983 "was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ." *Mitchum v. Foster, supra,* 407 U.S. 243. However, the critical aspect of this concept of §1983 is the concept of what is "supplementary." The 42d Congress never evinced any intention to create a general federal law of "constitutional" torts, so as to police random or isolated incidents of misconduct by state officers, whether characterized as negligent, grossly negligent, reckless, or intentional; rather, Congress intended only to provide a remedy when there was such an abuse of state power that the state courts were effectively closed to the victim.

Viewing §1983 in light of the most basic principles of statutory construction, recognized by this Court from an early day, see, e.g., *Pennington v. Coxe,* 6 U.S. (2 Cranch) 33, 59 (1804), this Court's struggles with the contours of liability under that statute are largely the unnecessary product of lack of judicial restraint—not judicial restraint in the sense that the phrase is used on the hustings, but in the sense of the proper judicial role of refusing to use a statute as a device to cure evils which were not those perceived by the legislature. As currently construed, §1983 *is* a font of tort law. Cf. *Pierson v. Ray,* 386 U.S. 547 (1967); *Smith v. Wade,* 461 U.S. 30 (1983). The rejection of claims obviously founded on conduct which is barely

negligent will do nothing to curb the lower courts in their continual search for new uses for §1983. The Court of Appeals for the Eighth Circuit has long held that negligence alone is not a sufficient basis for liability under §1983. E.g., *Branchcomb v. Brewer,* 669 F.2d 1297, 1298, appeal after remand, 683 F.2d 251 (8th Cir. 1983). Yet this recognition did not deter that Court from imposing liability for actual and punitive damages for "recklessness" or "gross negligence" on petitioner Humphrey, whose only default was in not hearing a noisy fight, when he was indisputably absent from the vicinity for at least part of the time, his duties having called him elsewhere. See appendix pp. A-4-5. The opinion of the Court of Appeals in this case, holding petitioners Booker and Humphrey liable on a theory of gross negligence, illustrates the truth of Justice Blackmun's dissent in *Davidson v. Cannon, supra,* that terms such as "negligent" or "reckless" do not provide an appropriate measure of liability under §1983. However, petitioners suggest that the solution is not the one advocated by Justice Blackmun.

This Court has held that municipal corporations are persons liable under 42 U.S.C. §1983 when an injury of constitutional dimension is inflicted pursuant to an official policy or custom. *Monell v. Dept. of Social Services, supra.* The Court is now struggling with mixed questions of law and fact involved in determining what kind of a "policy" entails liability. E.g., *Pembaur v. City of Cincinnati,* 746 F.2d 337 (6th Cir. 1984), cert. granted, 105 S.Ct. 3475 (1985), argued December 2, 1985; *City of Oklahoma City v. Tuttle, supra.* The Court has also held that state officers are immune from liability under §1983 if their conduct could not be said to have violated clearly established constitutional rights of which any reasonable person would have known. E.g., *Davis v. Scherer, supra; Harlow v. Fitzgerald,* 457 U.S. 800 (1981). Finally, the Court has recognized that a § 1983 action founded on the Due Process Clause of the Fourteenth Amendment will not lie if the state's law provides a remedy for the injury inflicted with comports with due process. *Parratt v. Taylor, supra; Hudson v. Palmer, supra;* see also, *Ingraham v.*

Wright, 430 U.S. 651 (1977). All of these cases can be harmonized by limiting the scope of liability of state officers under §1983 to those situations which evidence a true abuse of state power as amatter of state policy, in the face of clear federal constitutional standards outlawing such abuse of power and such policies.

What is lacking in the increasingly labyrinthine standard of liability under §1983 is any relationship between the statute's application and the evils it was intended to address. The statute simply does not create a species of federal common law analogous to §301 of the Labor Management Relations Act, 29 U.S.C. §185. See *Textile Works Union v. Lincoln Mills*, 353 U.S. 448 (1957). It was a special statutory remedy designed for special conditions, when state officers abused their power and state remedies were unavailable in practice to vindicate the basic rights of the injured. See *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1514 (11th Cir. 1985) (*en banc*) (Hill, J., dissenting),[2] and

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[2]Judge Hill's "bright line" of liability under §1983 is expressed as follows:

> One may find the "bright line" defined by ascertaining what the established state policy is. If the deprivation without due process results from established state policy, the person deprived may invoke §1983; if it results from random acts of one acting under color of state law, but not in accord with state policy, and a state remedy exists, no federal claim is to be found. One who has suffered a loss of federally protected rights as a result of action taken pursuant to state policy ought not be relegated to state procedures for redress. Where state policy denounces the infliction of the wrong, its institutions should satisfy due process.

Judge Hill's view at once reconciles the results of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1984) and *Hudson v. Palmer, supra*, and is wholly in harmony with the legislative purpose of §1983. This "bright line" also eliminates the vexing questions continually raised by this Court's §1983 immunity cases. Conduct which would be immune from §1983's reach could no longer serve as a predicate for liability, regardless of whether the defendants pleaded immunity. (Obviously, certain absolute immunities previously recognized by this Court can and would be retained under petitioners' suggested standard. E.g., *Stump v. Sparkman*, 435 U.S. 349 (1978).)

Mann v. City of Tucson Dept. of Police, 782 F.2d 790, 794-800 (9th Cir. 1986) (Sneed, J. concurring).[3] It was designed to enforce a new constitutional limitation on the power of state government, a limitation which protected citizens of a state from the state, *when the state would not or could not do so.* It should not be construed as extending liability (and with it, the realm of federal judicial supervision of the conduct of state officials) beyond those situations where the state fails to afford remedies both adequate in theory and available in practice.

The instant case provides an especially appropriate vehicle for reexamination of the scope of 42 U.S.C. §1983. It is a claim founded wholly on the Fourteenth Amendment's proscriptions, being a claim of deprivation of liberty without due process, through the medium of unlawful "punishment" of respondent Thomas while in petitioners' custody. See *Bell v. Wolfish,* 441 U.S. 520 (1979). It is a claim which was submitted to the jury solely on a theory of "gross negligence." See appendix p. A-7. The majority of the Court of Appeals would have it that the evidence in the case was sufficient for the jury to award actual and punitive damages under §1983 against petitioners for "reckless" conduct in failing to prevent the assault on respondent Thomas. Judge Bowman, in dissent, reaches a conclusion similar in spirit to those advocated by Judge Hill in *Gilmere v. City of Atlanta, supra,* and Judge Sneed in *Mann v. City of Tucson Dept. of Police, supra.* The case can and should be reviewed by this Court.

Petitioners do not advocate abdication of federal judicial responsibilities, but only a recognition that §1983 actions have

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[3] There Judge Sneed formulated a two-part solution to the *Parratt* problem. The existence of state remedies is irrelevant where the claim is based on an unconstitutional law, policy, procedure, pattern, or practice. But, if the deprivation results from an unplanned act (by definition not resulting from state policy) the availability of an adequate state remedy precludes the imposition of §1983 liability. This is so whether or not the right involved is termed "procedural" or "substantive".

so overwhelmed the federal courts that the forest has been lost in the welter of trees, many of them of the perennial variety. The concerns which motivated the 42d Congress have become trivialized by unthinking application of the "color of law" doctrine enunciated in *Monroe v. Pape,* while, in an effort to preclude the "constitutionalization" of every injury inflicted by a state officer, this Court has been forced to create zones of immunity and to categorize other claims as "mere negligence."

This Court's efforts to adhere to *Monroe* without federalizing every dispute between a citizen and his state officers have produced more litigation, not less. To what purpose? Will a crowded and dangerous jail be improved because a guard is held liable for punitive damages when he is found (years after the event) to have behaved "recklessly"? Will police officers, faced with what they believe to be exigent circumstances, seek search warrants more often because, years later, the object of the search persuades a jury that a warrant could and should have been otained? The standard of liability under §1983 is not and should not be the patchwork standard produced by *Monroe, Monell, Parratt* and *Harlow.* It can and should be the "bright line" sketched by Judges Hill, Sneed and Bowman: an injury to liberty or property of a citizen, inflicted by a state officer, is actionable under §1983 only if caused by the intentional conduct of the officer pursuant to established, unconstitutional state policy, under circumstances where state remedies are either inadequate in theory or unavailable in practice. Certiorari should be granted in this case to establish this "bright line."

2. Even absent a "bright line," adequate state remedies nevertheless preclude recognition of a deprivation of a liberty interest protected by the Fourteenth Amendment on the basis of grossly negligent conduct of state officers, which is random or unauthorized.

If §1983 is a "supplementary" remedy, intended to be available when state remedies, adequate in theory, were

unavailable in practice, *Monroe v. Pape, supra,* what application should it have when the state remedies, both historically and currently, are both adequate and available? This Court has provided the answer in *Ingraham v. Wright,* 430 U.S. 651 (1977), and *Parratt* and *Hudson, supra.* The thrust of these cases is that a state's fidelity to the common law can provide the ingredient of due process in cases of apparent deprivations of liberty or property, which precludes the conclusion that the state's action violates the Fourteenth Amendment.

Recent cases which address the issue of simple negligence as actionable *vel non* under §1983 have found that such negligence, or lack of due care, simply does not rise to constitutional dimension so as to implicate that statute. *Davidson v. Cannon, supra; Daniels v. Williams, supra.* However, these cases fall short of appreciating the significance of *Ingraham's* rejection of intentional infliction of punishment as a due process violation under the Fourteenth Amendment, in light of the availability of common law remedies. *Davidson* and *Daniels* approach the correct result, but expressly fail to exclude from the scope of §1983 state conduct amounting to "gross negligence" or "reckless indifference." *Daniels,* 106 S.Ct. at 667 n. 3.

Petitioners urge this Court to recognize that the prevailing characterization of the permissible scope of liability under 42 U.S.C. §1983 does not embrace any deprivation of a liberty interest by state officers which falls short of intentional conduct. The state of Missouri recognizes a duty in jail or prison guards to exercise ordinary care to protect those in their custody, and gives an action where guards fail to do so. *Miller v. Owlsey,* 422 S.W.2d 39 (Mo. banc 1967). In providing such a remedy, the availability of which in practice cannot be denied, the state has conformed to the dictates of the due process clause of the Fourteenth Amendment. In this case, where the conduct of defendants Booker and Humphrey, at least in the view of the panel majority and the magistrate below, could barely be found to be

reckless, plaintiff has wholly failed to establish a right to action under 42 U.S.C. §1983. The Court of Appeals for the Eighth Circuit (except Bowman, J.) and the other Courts of Appeals have produced a variety of views on this issue, see, e.g., *Gilmere v. City of Atlanta, supra;* cases cited in dissenting opinion of Bowman, J., appendix pp. A-23-24; and certiorari is appropriate to consider it.

3. Assuming that recklessness or gross negligence suffice as a predicate for liability under 42 U.S.C. §1983, it becomes all the more vital that this Court explicate standards to govern jury evaluation of claims for actual and punitive damages against prison guards and officials based on such theories.

This Court has authorized the award of punitive damages in actions under 42 U.S.C. §1983 when the standard of liability for actual damages is one of recklessness or gross negligence. *Smith v. Wade, supra.* The question discussed above, i.e., whether gross negligence is sufficient of itself to import liability for actual damages, was not before this Court in *Smith. Id.,* at 461 U.S. 33-34. At the same time, in the context of actions brought against prison offidials, the Court has repeatedly emphasized the broad administrative and discretionary authority of prison guards and officials in the "extraordinarily difficult" undertaking of operating prisons. E.g., *Hewitt v. Helms,* 459 U.S. 460, 467-68 (1983); cf. *Whitley v. Albers,* ____ U.S. ____ (March 4, 1986). The lower courts, accepting this discretion, have also recognized that "[t]he existence of some violence in prisons is unavoidable, given the character of the prisoners society must place behind bars," *Doe v. Dist. of Columbia,* 697 F.2d 1115, 701 F.2d 948, 941 (D.C.Cir. 1983) (separate opinion of MacKinnon, J.); and that some "mistakes and some arbitrary conduct are inevitable incidents of effective management of a large group of confined human beings." *United States ex rel. Miller v. Twomey,* 479 F.2d 701, 717 (7th Cir.), cert. denied *sub nom. Gutierrez v. Dept. of Public Safety,* 414 U.S. 1146 (1974). If the

discretion of prison authorities is to be accorded recognition in the context of claims for injunctive relief, it is entirely proper that it should be accorded similar recognition in evaluating claims for actual and punitive damages, particularly the latter. However, the Court of Appeals wholly disregarded prison officials' discretion in examining the sufficiency of the evidence to support the verdicts against petitioners, and instead reversed the trial court, which had set aside a punitive damages award against petitioner Humphrey on the stated ground of insufficient evidence. Appendix p. A-18.

Unless this Court takes this opportunity to clarify the standards for determining the sufficiency of evidence to warrant verdicts for reckless conduct against prison authorities, it is inevitable that the opinion of the Court of Appeals will result in automatic submission of punitive damages issues to the jury in all §1983 actions against prison officials, and the automatic disregard by the lower courts and the juries of the discretion supposedly recognized as inhering in prison authorities. In addition, the opinion of the Court of Appeals in this case points the way to wholesale circumvention of this Court's decisions in *Daniels v. Williams* and *Davidson v. Cannon, supra.* There is no meaningful distinction between the conduct of petitioners in this case and the conduct of the authorities in *Davidson, supra,* considered in light of all the circumstances and in light of the "unreviewable discretion" which Justice Stevens has recognized as a necessary incident of prison administration, *United States ex rel. Miller v. Twomey, supra,* 479 F.2d at 721.

The dissenting opinion in *Davidson* is in perfect harmony with the opinion of the Court of Appeals here. Judge Ross's view of petitioners' "recklessness" is but another way of stating that every failure to protect a prisoner will present a jury question of "recklessness." Prison authorities will not be able to make any decisions concerning placing prisoners, or even leave their appointed rounds for any reason or for any period of time, without risking liability for "recklessness." The view of the

Court of Appeals in this case is at variance with the views expressed by this Court in *Hewitt* and the views of other Courts of Appeals. See *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985); *Kish v. County of Milwaukee*, 441 F.2d 901 (7th Cir. 1971); *United States ex rel. Miller v. Twomey, supra.* The Decision below should be reviewed and corrected by this Court before all claims against prison authorities become a matter of courts and juries second-guessing errors of judgment by guards in difficult situations.

The intolerably expansive view of "recklessness" for purposes of imposing liability for actual damages evinced by the Court of Appeals in this case is exacerbated when one turns to the majority's casual consideration of the punitive damages issue. Dismissing the considered view of the trial court that there was insufficient evidence to warrant the award of punitive damages against petitioner Humphrey, see appendix p. A-47, the Court of Appeals simply declared that "[s]ince the standard for awarding punitive damages in this case is substantially the same as that for actual damages, the jury's punitive damage award against Humphrey should have been sustained." Appendix p. A-13.

"We may . . . set it down as a condition of awarding punitive damages that the defendant almost certainly knew that what he was doing was wrongful and subject to punishment." *Soderbeck v. Burnett County*, 752 F.2d 285, 291 (7th Cir. 1985). An examination of the record in this case suggests that neither petitioner Booker nor petitioner Humphrey knew that their actions or inactions were culpable. There was no evidence warranting a belief that there existed a "pervasive risk of harm" to prisoners in the jail in September, 1980. Cf. *Porm v. White*, 762 F.2d 635 (8th Cir. 1985). Certainly defendant Booker, charged with supervising the entire jail (some 228 prisoners plus staff), could not have anticipated that Humphrey, or his immediate supervisor, would not make rounds or act to prevent a fight. The Court of Appeals could point to no evidence denying that

the guards on respondent's jail tier normally *did* make regular rounds, or the obvious truth that fights among prisoners would be timed to avoid guards. More significantly, the Court of Appeals simply ignored undisputed facts that respondent has spent several months in the jail without incident, that the single inmate who had actually assaulted Thomas previously was removed from the jail, and that the inmate (Parker) named by Thomas to Booker as a threat had no record whatever of violence toward other inmates in general or Thomas in particular.

Petitioner Humphrey's subjection to punitive damages is wholly unwarranted. The only support for his liability is an inference that he *should have known* that a fight was occurring on his tier, based on evidence that it was loud and lengthy, although it is undisputed that he was not on the floor for at least part of the time the fight was supposedly going on. See appendix pp. A-4-5. This evidence is not so very much greater than that found to establish only lack of due care on the part of guards in *Davidson v. Cannon, supra.* Surely something more egregious than this is required to allow a jury to award punitive damages.

What conduct of petitioners would the jury, and the Court of Appeals, deter by the award of punitive damages in this case? Surely the recognized discretion inhering in prison authorities requires evidence supporting a jury verdict for punitive damages to be evaluated with more precision than exhibited by the Court of Appeals. Petitioner Booker's ability to protect Thomas, based on complaints against unidentified prisoners or prisoners never shown to have assulted anybody, was limited by the resources available to him. The task could not be considered easy in an institution which was at capacity at the time. It simply cannot be said that petitioner Booker, in deciding that Thomas's expressed fears did not require extraordinary protective measures, abused his discretion as chief of security of the jail and acted recklessly.

The opinion of the Court of Appeals in this case, in the aftermath of *Daniels* and *Davidson* will necessarily result in the automatic submission of punitive damages to the jury in every case where a prisoner claims that his guards acted with gross negligence or recklessly. Indeed, if the view of the Court of Appeals is correct, a jury's verdict which awards actual damages but fails to award punitive damages will be defective, and will require a new trial on the question of damages. If the standards of liability for actual and punitive damages are the same, on what principled basis can the issue of punitive damages be withheld from the jury or the failure of the jury to award such damages be affirmed on appeal? Only this Court can answer this question, which has serious implications for every prison guard and official in the nation, and, indeed, for every potential defendant in a §1983 case.

4. In light of the resemblance of civil rights actions to personal injury actions, it is entirely appropriate to recognize and give effect to contingent fee agreements as limitations on the award of "reasonable" attorney's fees under 42 U.S.C. §1988.

The Court of Appeals, consistent with views expressed by a panel, *Sisco v. J. S. Alberici Const. Co.*, 733 F.2d 55 (8th Cir. 1984), rejected petitioners' arguments in this case that the contingent fee agreement between respondent and his attorney controlled the award of fees under 42 U.S.C. §1988, either as the maximum allowable fee, or as the "lodestar." Appendix p. A-17.

This Court has construed §1988 to require that attorney's fees awarded to prevailing parties be computed with reference to a "market rate," i.e., an hourly rate in line with rates prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. *Blum v. Stenson,* ____ U.S. ____ (1984). This market rate is to be multiplied by the total number of "billable" hours proved by the fee applicant.

"Billable" hours are only those reasonably expended in pursuit of the ultimate result obtained, and the product of market rate times number of billable hours is to be evaluated in light of the degree of success achieved—the crucial factor in determining reasonableness of a fee. *Hensley v. Eckerhart,* 461 U.S. 424 (1983). To date, this Court has yet to determine the role that contractual fee arrangements are to play in the fee award process. In particular, this Court has not addressed the question of the recognition of contingent fee contracts.

The seminal case construing 42 U.S.C. §1988 recognized that in no event "should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount." *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 718 (5th Cir. 1974). The *Johnson* court derived its criteria from the prevailing American Bar Association canons of ethics barring attorneys from charging unreasonable fees. 488 F.2d 719. In *Cooper v. Singer,* 689 F.2d 929 (10th Cir. 1982), vacated on rehearing *en banc,* 719 F.2d 1496 (10th Cir. 1983), a panel of the Court of Appeals for the Tenth Circuit held that a contingent fee contract, otherwise enforceable, should fix the maximum allowable fee awarded a prevailing party under 42 U.S.C. §1988. The Court of Appeals for the Eleventh Circuit has held it appropriate to resort to a contingent fee contract as the "lodestar" figure in computing fee awards. *Pharr v. Housing Authority of City of Prichard,* 704 F.2d 1216, 1218 (11th Cir. 1983).

It is apparent by now that 42 U.S.C. §1988 was not intended to produce windfalls to attorneys. Nothing in the statute or its legislative history suggests that contingent fee contracts (or other fee contracts, for that matter) should be disregarded by courts assessing "reasonable" fees under the statute. This Court has emphasized that the hallmark of the reasonable fee award is the "market rate" for time reasonably spent to secure the actual degree of success obtained. *Blum v. Stenson, supra.* If an attorney and his client freely choose to contract for a certain fee,

it is unreasonable, and at variance with the intent of the statute, to award more than that amount to the client under §1988. The statute was enacted for the benefit of prevailing plaintiffs, not their attorneys, to reimburse such plaintiffs for fees they would otherwise pay out of their own pockets. See Senate Report No. 94-1051, 1976 U.S. Code, Cong. & Admin. News 5908, 5910. No better assurance that a fee is "reasonable" is provided than by adverting to an agreement of the attorney and client fixing the fee, particularly when the agreement is of the type and in the range of agreements customarily entered into in similar situations.

In the instant case, respondent and his attorney entered into a 50% contingent fee agreement, sanctioned by Missouri law. See Mo.Rev.Stat. §484.140 (1978). Based on the damages awarded by the trial court or by the Court of Appeals, respondent should have been entitled, at most, to either $7,500 or $12,000 in attorney's fees, taxed as part of the costs. 42 U.S.C. §1988. In light of respondent's modest success (he sought damages of $150,000 and was awarded $15,000 in damages by the trial court, increased to $24,000 on appeal), the maximum fee allowable in accordance with the fee agreement would be generous. For centuries, citizens of this country have obtained assistance of counsel to vindicate their rights through the mechanism of the contingent fee contract. The bar has strenuously resisted elimination of that device. Since it is so tightly woven into the fabric of our law, it must be deemed to have been understood by Congress in enacting §1988. Recognition of the role of contingent fee contracts in civil rights actions would be in full accord with this Court's view that such actions most closely resemble personal injury actions. See *Wilson v. Garcia,* 105 S.Ct. 1938 (1985). Certiorari is warranted to address the question of the proper role of contingent fee contracts under §1988.

5. The constitutionality of 28 U.S.C. §636(c) ought to be resolved directly by this Court.

Petitioners are aware that every Court of Appeals to address the question has validated the creation of article III judges by the mechanism of consent of the parties, pursuant to 28 U.S.C. §636(c), and that this Court has repeatedly denied certiorari. See, e.g., *Lehman Bros. Kuhn Loeb Inc. v. Clark Oil Refining Corp.*, 739 F.2d 1313 (8th Cir. 1984) (*en banc*), cert. denied, 105 S.Ct. 906 (1985); *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 718 F.2d 971 (9th Cir. 1983), vacated on rehearing *en banc*, 725 F.2d 537 (9th Cir.), cert. denied, 105 S.Ct. 100 (1984). Nevertheless, the matter is sufficiently serious to warrant certiorari, particularly where, as here, the parties' Seventh Amendment rights are also implicated.

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

So saying, the framers of the Constitution firmly established the third, coordinate branch of the federal government as an essential element of the system designed by them to safeguard liberty. Consequently, when the authority of a judge to sit on a case arising under article III is drawn in question, "basic constitutional protections designed in part for the benefit of litigants" are implicated. *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion by Harlan, J.). In the instant case, the issues include the propriety of a non-article III officer presiding over a jury trial, granting judgment notwithstanding the verdict in part, and purporting to enter a final judgment - all without any intervention by a district judge.

Unlike the situation in *Glidden,* there can be no doubt here that the magistrate to whom this case was assigned is not and cannot be considered an article III judge. See 28 U.S.C. §§631 et seq.; *Wingo v. Wedding,* 418 U.S. 461 (1974); cf. *Todd v. United States,* 158 U.S. 278 (1895) (dealing with U.S. commissioners). They have been described as "para-judges", or adjuncts of the district court. See *United States v. Saunders,* 641 F.2d 659 (9th Cir. 1981), cert. denied, 452 U.S. 918 (1981). This Court has upheld their ability to perform many functions under the supervision of the district court, "so long as the ultimate decision is made by the district court." *United States v. Raddatz,* 447 U.S. 667, 683 (1980); *Matthews v. Weber,* 423 U.S. 261 (1976). Under §636(c), however, the ultimate decision can be made by the magistrate, even to the point of overturning a jury verdict, as was done in part here. The question, therefore, is whether Congress can authorize the parties, in concert with the district judge, to invest a magistrate with the judicial power of the United States. Petitioners submit that the answer is "no".

The judicial power of the United States must be exercised by courts having the attributes prescribed in article III. *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.,* 459 U.S. 50 (1982) (plurality opinion). Certain powers over the judiciary were explicitly denied to Congress by article III of the Constitution, *O'Donoghue v. United States,* 289 U.S. 516 (1933), and it seems scarcely debatable that Congress can no more transfer (or authorize transfer) of the judicial power than it can assume executive power or legislate outside the manner prescribed in article I. Cf. *Immigration & Nat. Service v. Chadha,* 462 U.S. 919 (1983). To say that Congress, through the mechanism of the litigants' consent, can confer article III powers on persons who are not article III judges is to say that Congress can amend the Constitution by the simple expedient of authorizing others to do so.

Consent of the parties is the linchpin of the reasoning of the courts of appeals in upholding §636(c). It is elementary, however, that jurisdiction of federal courts cannot be conferred by consent; stated another way, defects of federal jurisdiction cannot be waived or overcome by agreement of the parties. *Mitchell v. Maurer,* 293 U.S. 237 (1934); *McClaughry v. Dening,* 185 U.S. 49 (1902); *Metcalf v. City of Watertown,* 128 U.S. 586 (1888).

The defect of §636(c) is that the ultimate decision in a case assigned thereunder is *not* that of an article III judge; it is the decision of the magistrate acting in place of such a judge and wholly without his intervention after the case is assigned. As the plurality observed in *Northern Pipeline,* Congress has the power to create "adjuncts" (e.g., magistrates) so long as the essential attributes of judicial power are retained in the article III court. *Id.,* 102 S.Ct. 2874 n. 29. In the instant case, the judgment at issue from which both parties appealed was entered by the magistrate, who is not an article III judge. The rulings on instructions and a directed verdict were made by the magistrate; the magistrate exercised the judicial power of the United States. He had no right to do so.

The roots of the issue now before this Court lie in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). The result must be the same: Congress cannot confer or alter the jurisdiction of the federal courts except in a manner consistent with article III. The Magistrate's Act, §636(c), is not consistent with article III and must fall.

The Magistrate's Act is likewise inconsistent with the guaranty of the Seventh Amendment. In trial by jury under the Seventh Amendment, both the court and the jury are essential factors. Trial by jury means a trial by a jury in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and, in civil cases, to set aside their verdict if it is against the law or the

evidence. *Capital Traction Co. v. Hof,* 174 U.S. 1 (1899); *United States v. Philadelphia Reading Railroad Co.,* 123 U.S. 113, 114 (1887); see also *Slocum v. New York Life Ins. Co.,* 228 U.S. 364, 382 (1913). Surely the power to set aside jury verdicts is a substantial exercise of the judicial power of the United States. Albeit trial by jury can be waived, the parties did not do so in this case. Consequently, this Court can and should consider whether the Seventh Amendment, as well as Article III, precludes the scheme of 28 U.S.C. §636(c) insofar as it renders jury verdicts vulnerable to rulings by non-Article III officers.

CONCLUSION

For the foregoing reasons, certiorari should issue to the Court of Appeals for the Eighth Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83-2540; No. 83-2541; No. 83-2573

George Thomas,
Appellee,

v.

Thomas Booker, Alfonso Lark
and Major C. O. Humphrey,
Appellants.

Appeal from the United States
District Court for the
Eastern District of Missouri.

Submitted: August 20, 1985

Filed: February 14, 1986

Before LAY, Chief Judge, HEANEY, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges, En Banc.

ROSS, Circuit Judge.

George Thomas filed this 42 U.S.C. § 1983 action alleging that three employees of the St. Louis City Jail, Thomas Booker, William Humphrey, and Alphonso Lark, violated his constitutional rights by failing to protect him from violent attacks by other inmates. After a panel of this court considered the case, *see Thomas v. Booker,* 762 F.2d 654 (8th Cir. 1985), this court,

on its own motion, granted rehearing en banc. We now affirm the judgment awarding Thomas $3,000 actual damages and $10,000 punitive damages against Booker and $1,000 actual damages against Humphrey. We also reinstate a jury verdict of $10,000 punitive damages against Humphrey which had been set aside by the trial court. Finally, we reverse a judgment awarding $1,000 actual damages against Lark.

FACTS

Thomas was placed in the St. Louis City Jail as a pretrial detainee in May of 1980. On September 17, 1980, another prisoner, Gregory Swink, rushed into Thomas' cell and struck him in the right eye. After treatment, he was returned to the jail and placed in the same cell which he had occupied earlier. The cell was located on the fifth floor of the facility in what is termed "tier 5-1". Tier 5-1 houses the "general population" in general and prisoners classified as "aggressive" in particular.

On the morning of September 22, 1980, Thomas became involved in a fight with another prisoner, Howard Gillian, in the tier 5-1 dayroom. No guards appeared until the fight was essentially over. By that time, Gillian had suffered a broken jaw, while Thomas suffered a broken hand and retinal detachment in his right eye. Surgery on the eye failed to prevent blindness.

Thomas then initiated this suit. His claim against Booker and Lark was based on his placement in tier 5-1. Booker was the chief of security at the jail and Lark was the supervisor of correctional officers. The evidence with respect to Booker and Lark was summarized by the panel court as follows:

> With respect to Booker, the record includes testimony by Thomas (1) that in May 1980, he asked Booker not to remove him from administrative segregation (where he initially had been placed upon his transfer to the jail from the city workhouse) because he feared other inmates might attack him; (2) that in July 1980, following the discovery in

Thomas's cell of a homemade knife, he told the investigating committee of which Booker was a member that he felt he needed the weapon for protection; (3) that while he was in disciplinary segregation as punishment for the homemade knife incident, he told Booker that he feared for his physical safety if he was returned to the general population [; in response, Booker referred to Thomas as a "smart, big-mouth nigger" and advised him that "I'm going to send you somewhere where I won't have no trouble out of you"; immediately thereafter Thomas was sent to tier 5-1]; (4) that the day after his return to the jail from the hospital where he had been treated for injuries suffered in the September 17, 1980 attack by Swink, he again expressed his fear of attack by other inmates and asked Booker to remove him from the general population. Thomas also testified that, following the September 17, 1980 attack by Swink but preceding his September 22, 1980 fight with Gillian, he specifically asked Booker to move him away from cellmate Parker. The record can be read to indicate that it was Parker who instigated the fight between Thomas and Gillian. Additionally, other inmates testified that they heard Thomas ask Booker to remove him from the general population. Parker testified that he told Booker if Booker didn't move Thomas, Thomas was going to be "chased" off the floor. Finally, there is every indication in the record that although classification of inmates for cell assignment purposes generally was handled by a social services office and not by Booker, Booker had complete authority to move a prisoner for security reasons.

* * *

With respect to Lark, Thomas's testimony establishes that he only spoke with Lark about his fear of attack by other inmates in the jail's general population on one occasion, and then only in a very generalized fashion. Lark told him that he should discuss his concerns with Booker, who

> was in charge of security. This conversation took place before Thomas ever was assigned to a general population cell; at the time, Thomas was in administrative segregation following his transfer to the jail from the city workhouse. There is nothing in the record to indicate that Lark knew of Thomas's subsequent complaints to Booker, of the September 17, 1980 attack by Swink, or of Parker's threats against Thomas.

Thomas v. Booker, supra, 762 F.2d at 658-59 (footnote omitted).

Thomas' claim against Humphrey was grounded on Humphrey's failure to detect and intervene in Thomas' fight with Gillian on September 22, 1980. Humphrey was a correctional officer at the jail. The panel summarized the evidence with respect to the claim against Humphrey as follows:

> There is no dispute that Humphrey was on duty when the September 22, 1980 fight between Thomas and Gillian occurred and that the fight took place in an area of the jail to which Humphrey was assigned. It seems equally clear that guards were to make full rounds every fifteen to twenty minutes. However, little else about that fight or Humphrey's role regarding it is clear from the record. Thomas and other inmates estimated that the fight lasted anywhere from forty-five minutes to two hours and that during that time, no guard came by on rounds. Prison officials testified that it would be impossible for a fight to have gone undetected for such a long time. There was testimony by inmates that a great deal of noise was made during the fight. Prison officials testified that the amount of noise claimed by the inmates to have been generated by this fight surely would have attracted the attention of the guards. Thomas cites as proof of Humphrey's failure to make rounds a jail record which indicates that Humphrey left his assigned floor during his September 22, 1980 duty shift for

> approximately twenty-five minutes. But the jail record suggests that Humphrey did so in order to fulfill another duty function. Furthermore, Humphrey testified that even if he did leave the floor, his rounds would have been made by his supervisor.

Id. at 659-60

By the consent of the parties, the jury trial in this case was held before a magistrate. *See* 28 U.S.C. §636(c). After the trial was concluded, the magistrate instructed the jury and submitted verdict forms to be used for each of the defendants.[1] After deliberating, the jury returned to the courtroom to announce its verdict. At this point, the magistrate was handed the verdict forms. The forms were blank except for the verdict form for defendant Booker. This form granted Thomas an award of $5,000 actual damages and $25,000 punitive damages. The magistrate then called the attorneys to the bench. After discussing the situation with the attorneys off the record, the following exchange took place:

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[1] For example, the verdict form for defendant Booker read as follows:

VERDICT

We, the jury, unanimously find as follows:

On Plaintiff's claim for violation of his civil rights, we find in favor of Plaintiff George Thomas against Defendant Thomas Booker.

We, the jury assess damages of Plaintiff as follows:

For Actual Damages $_____(Stating amount).

For Punitive Damages $_____(Stating amount).

_____

FOREPERSON

THE COURT: I can only say this, Miss MacMillan, and I'll speak to you as the foreperson of the jury, it's incomplete.

THE FOREPERSON: You're right, we're just realizing that sitting here. I'm sorry.

THE COURT: You want to take it back and finish it for me?

THE FOREPERSON: Yes, I sure will.

Trial Transcript at 80-81. The jury retired again to deliberate upon its verdict.

When it returned, all three verdict forms were completed. The form for Booker had been modified so as to grant Thomas an award of $3,000 actual damages and $10,000 punitive damages. As completed, the forms for Humphrey and Lark gave Thomas an award of $1,000 actual damages and $10,000 punitive damages against Humphrey, and $1,000 actual damages and $5,000 punitive damages against Lark.

The defendants then filed a motion for a JNOV or a new trial. The magistrate partially granted the motion for JNOV by setting aside the punitive damage awards against Humphrey and Lark on the basis that the evidence did not support the awards. The defendants' motion was denied in all other respects.

The defendants then appealed, arguing that the motion should have been granted in its entirety. Thomas cross-appealed, arguing that the motion should have been denied in its entirety.

DISCUSSION

1. Substantive Liability

"[P]rison officials may be liable where they are 'deliberately indifferent to [a prisoner's] constitutional rights, either because

they actually intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates.' " *Martin v. White,* 742 F.2d 469, 474 (8th Cir. 1984) (quoting *Branchcomb v. Brewer,* 669 F.2d 1297, 1298 (8th Cir. 1982)). Similarly, "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. 30, 56, 103 S.Ct. 1625, 1640 (1983). On appeal, the defendants argue that the jury instructions given by the magistrate failed to state the proper liability standard.

The challenged instruction reads as follows:

> Your verdict must be for Plaintiff if you believe:
>
> FIRST: Defendants knew or should have known that placing inmates in the general population and not providing close supervision made it highly foreseeable that some inmates, and in particular the Plaintiff George Thomas, would be physically attacked and seriously injured, and
>
> SECOND: Defendants' conduct was grossly negligent or an egregious failure to protect the plaintiff George Thomas, and
>
> THIRD: Such acts of defendants were done under the color of law of the State of Missouri, and
>
> FOURTH: Such acts violated Plaintiff's Constitutional right to be free from cruel and unusual punishment.
>
> FIFTH: As a direct result of such conduct, the plaintiff suffered injury.
>
> Gross negligence as used in this instruction means a callous indifference or thoughtless disregard for the consequences of one's acts or failure to act.

> Egregious failure to protect means a flagrant or remarkably bad failure to protect.

Instruction No. 7. Although defendants' counsel objected to this instruction, the only stated basis for the objection was that the evidence was insufficient to submit the matter to the jury:

> MR. KOVAC: Your Honor, I'd like to object to Instruction No. [7]. I believe that *with regard to the first element,* defendants knew or should have known placing inmates in the general population, et cetera; *I don't believe there's any evidence in the case to support the giving of that instruction* with regard to the first paragraph of Instruction No. [7].

Supp. Trial Transcript at 1-2 (emphasis added).[2] The defendants' present argument that the instruction applied an improper legal standard was not raised in the objection.

In *Johnson v. Houser,* 704 F.2d 1049 (8th Cir. 1983), the court summarized the necessity of a specific objection to a challenged instruction:

> Fed. R. Civ. P. 51 provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Rule 51 requires that an objection be "sufficiently specific to bring into focus the precise nature of the alleged error." *Wilson v. Crouse-Hinds Co.,* 556 F.2d 870, 875 (8th Cir.) *cert. denied,* 434 U.S. 968, 98 S.Ct. 513, 54 L.Ed.2d 455 (1977); *quoting Palmer v. Hoffman,* 318 U.S. 109, 119, 63 S.Ct. 477, 483, 87 L.Ed. 645 (1943). The purpose of Rule 51 is to compel

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[2] Defendants' motion for a new trial also contended that Instruction No. 7 was improper. Again, the only given ground for this contention was the lack of evidence to support the instruction.

> litigants to afford the trial court an opportunity to correct any error in the instructions and also to prevent the losing party from obtaining a new trial through relying on a possible error in the original trial. *Lange v. Schultz,* 627 F.2d 122, 128 (8th Cir. 1980).

Id. at 1051. In this case, defendants' counsel's objection failed to satisfy the specificity requirement of Fed. R. Civ. P. 51. Thus, our examination of the challenged instruction is limited to a review of whether any error in the instruction is "plain error in the sense that a miscarriage of justice would otherwise result." *Id.* at 1051. "The plain error exception is narrow and is confined to the exceptional case in which error has affected seriously the fairness, integrity or public reputation of judicial proceedings." *Id.* at 1052.

A panel of this court concluded that the challenged instruction was not perfect, but that it was not no prejudicially erroneous as to warrant a reversal. The panel reasoned as follows:

> Instruction No. 7 is virtually identical to an instruction previously found by this Court to be not prejudicially erroneous.[2] *See Wade v. Haynes,* 663 F.2d 778, 782 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade,* 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983).[3]

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[3] The verdict directing instruction in *Wade v. Haynes* read as follows:

> FIRST: Defendants knew or should have known that placing two or more inmates in the same cell in administrative segregation with only one guard on duty in that building made it highly foreseeable that some inmates, and in particular the plaintiff Daniel R. Wade, would be physically attacked and sexually abused, and
>
> SECOND: Defendants' conduct was grossly negligent or an egregious failure to protect the plaintiff Daniel R. Wade, and
>
> THIRD: Such acts of the defendants were done under the color of the law of the State of Missouri, and,

(footnote continued)

Subsequent to *Wade v. Haynes, the Court determined that a defendant's conduct in cases such as the instant case should be evaluated in terms of "reckless disregard." See supra.* Yet the precise term "reckless disregard" does not appear in Instruction No. 7. While the trial court might artfully have updated the language of its instruction to reflect the relevant statements of law made by this Court,

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FOURTH: Such acts violated plaintiff's constitutional right to be free from cruel and unusual punishment, and,

FIFTH: As a direct result of such conduct, the plaintiff suffered injury.

Gross negligence as used in this instruction means a callous indifference or a thoughtless disregard for the consequences of one's act or failure to act.

Egregious failure to protect means a flagrant or remarkably bad failure to protect.

Wade v. Haynes, 663 F.2d 778, 782 (8th Cir. 1981). The court responded to the defendants' objections to this instruction and other instructions relating to an eighth amendment violation with the following comments:

> These instructions make it clear that for plaintiff to recover defendant's *acts* must have violated plaintiff's right *to be free* from cruel and unusual punishment. Thus, defendant's action must have been more than negligent, his conduct must have been such that it was done with callous disregard of plaintiff's right not to be punished in an inhumane and base way. The mere placement of plaintiff in the cell with two others from the general population without further incident would not have given legal sustenance to his claim under the eighth amendment. It was the callous nature of this act which recklessly exposed him to inhumane treatment which constituted the actionable wrong. The inhumane treatment was part of the wrong in the same sense as if Smith had committed the harm himself.
>
> We find no prejudicial error in the instructions.

Id. (Emphasis in original.) The court also noted that "[t]he objection concerning the use of [the term] 'callous indifference' is specious." *Id.* at 782 n.2.

we find that the failure to do so was, at worst, harmless error. By including in Instruction No. 7 the words "gross negligence," defined as "a callous indifference or thoughtless disregard," and "egregious failure to protect," defined as "a flagrant or remarkably bad failure to protect," the trial court sufficiently indicated to the jury the nature of conduct for which defendants could be held liable.

* * *

Defendants challenge the first paragraph of Instruction No. 7 which conditioned defendants' liability on a finding by the jury that defendants knew or should have known that placing Thomas in the jail's general population without close supervision made an attack upon him highly foreseeable. Defendants argue that this portion of Instruction No. 7 was inadequate and that a proper instruction would preclude liability unless defendants "knew or should have known of a specific, clear and present danger to the safety of [Thomas], a danger manifested by evidence of objective facts and circumstances which should have led [them], in the exercise of professional judgment, to act in certain ways." Brief of Appellants at 31. Defendants do not cite any authority in support of such an instruction. Moreover, we are not convinced that defendants' proposal correctly states the controlling law in a manner that would aid the jury.

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[2] A holding that an instruction was not prejudicially erroneous is not necessarily tantamount to a holding that the instruction is an ideal model for future instructions.

In view of the above reasoning, we find that any error in the instruction did not constitute plain error.

The defendants also argue that the court erred in not granting their motion for a JNOV in the entirety because the evidence did not support the jury's verdict. In *Smith v. Updegraff,* 744 F.2d 1354 (8th Cir. 1984), this court set forth the standard of review to be applied when considering such a challenge:

> [I]n passing upon the motion for judgment, the trial court and this court are (1) to consider the evidence in the light most favorable to the plaintiffs as the parties prevailing with the jury; (2) to assume that all conflicts in the evidence were resolved by the jury in favor of the plaintiffs; (3) to assume as proved all facts which plaintiffs' evidence tends to prove; (4) to which plaintiffs' evidence tends to prove; (4) to give the plaintiffs the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and (5) to deny the motion if, reviewing the evidence in this light, reasonable men could differ as to the conclusions to be drawn from it.
>
> [*Hanson v. Ford Motor Co.,* 278 F.2d 586, 596 (8th Cir. 1960)]. Moreover, "[c]ircumstantial as well as direct evidence . . . is relevant to a determination of sufficiency" of the evidence in supporting the jury verdict, and the verdict may be overturned " 'only where the evidence points *all one way* and is susceptible of *no* reasonable inferences sustaining the position of the nonmoving party.' " *Zoll v. Eastern Allamakee Community School District,* 588 F.2d 246, 250 (8th Cir. 1978) quoting *Giordano v. Lee,* 434 F.2d 1227, 1231 (8th Cir. 1970) (emphasis in original).

Id. at 1366. Applying this standard, we find that the trial court properly denied the JNOV motion as it applied to Booker. With respect to Humphrey, the trial court erred in partially overturning the jury's verdict. The evidence, taken in the light most favorable to the jury's verdict, supports a conclusion that

arker forced Thomas to fight Gillian[4] and that Humphrey knew about the fight (the fight was noisy and was estimated to have lasted anywhere from forty-five minutes to two hours), yet, in reckless disregard of the inmate's right to be free from assault, permitted it to continue. Since the standard for awarding punitive damages in this case is substantially the same as that for actual damages, the jury's punitive damage award against Humphrey should have been sustained. Finally, with respect to Lark, the trial court properly overturned the jury's verdict awarding punitive damages against him, but erred in not overturning the award of actual damages. The evidence does

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[4] Parker, the apparent leader of the prisoners on tier 5-1, testified as follows:

> Q. Did you have anything to do with starting or stopping that fight personally?
>
> A. I started and I stopped it.
>
> Q. You started it and you stopped it but you actually didn't — you didn't participate in the fight?
>
> A. No, I didn't.
>
> Q. How could you start the fight?
>
> A. Well, by suggesting — if they wouldn't have fought against each other then we'd had a fight, me and Mundane [(another inmate)] against him [Thomas] and the other guy [Gillian].
>
> Q. And how did you stop it?
>
> A. When he [Thomas] grabbed his eye and folded over in the corner, I told him [Gillian] to stop hitting.
>
> * * *
>
> Q. You wouldn't have classified this fight as a fight for fun, would you, between Gillian and Thomas?
>
> A. No, sir.

Trial Transcript, Parker at 11-12 & 21.

not support a conclusion that Lark acted in reckless disregard of Thomas' right to be free from violent attacks, so no damages could be assessed against Lark.

2. Jury Confusion.

A panel of this court concluded that the events surrounding the jury's return of its verdict indicated that the jury was confused and that the final verdict which the jury returned may not have represented its true intention. The panel recognized that "it is impossible now to ascertain why the jury initially failed to complete all three verdict forms." *Thomas v. Booker, supra,* 762 F.2d at 661. Nevertheless, the panel adopted the magistrate's finding that "the jury meant only to award damages against Booker and when told their verdict was incomplete, they simply redistributed their original award . . . ." *Thomas v. Booker,* No. 80-1297C(2), slip op. at 3 (E.D. Mo. Oct. 14, 1983) (memorandum opinion of magistrate on defendants' motion for JNOV or new trial).

Although the magistrate's decision to grant a partial JNOV may have been affected by the perceived jury confusion, we conclude that the actual legal basis for the decision was the magistrate's finding that the evidence did not support the verdict. This conclusion is reached upon a reading of the complete text of the magistrate's opinion on this issue, which states in relevant part:

> The Court could reasonably infer that the jury meant only to award damages against Booker and when told their verdict was incomplete, they simply redistributed their original award as indicated. The punitive damages against Booker are barely supported by the evidence. There is inadequate evidentiary support for a punitive award against either Lark or Humphrey.
>
> Accordingly, it is this Court's opinion that the assessment of punitive damages against Defendant Lark and Defendant Humphrey should be set aside.

Id. We note also that, on appeal, the parties did not raise the possibility of jury confusion as a separate basis for a reversal or new trial. Nevertheless, under the circumstances of this appeal, we must determine whether the perceived jury confusion warrants any action by this appeals court.

We conclude that we need not and should not attempt to resolve the question of what the jury intended when it first returned with an incomplete verdict. Instead, we must look to the jury's *final verdict,* which was submitted by the jury after it returned from a second round of deliberations. At that time, the jury submitted all three verdict forms, and all three had been filled out in Thomas' favor. Absent a determination that the jury's final verdict was prejudiced by improper instructions or actions by the magistrate, or that the evidence does not support the verdict, there is no basis for tampering with the jury's final verdict in this case. *Cf. Regional Investment Co. v. Haycock,* 723 F.2d 38, 41 (8th Cir. 1983) ("We must give the jury's verdict every reasonable indulgence."). *See also Smith v. Updegraff, supra,* 744 F.2d at 1368 ("speculation as to what the jury intended" by its verdict is not permitted since "this court cannot replace the jury's judgment with its own"); *Chicago Rock Island and Pacific Railroad Co. v. Speth,* 404 F.2d 291, 295-96 (8th Cir. 1968) (rule that certain jury errors cannot be used to impeach a verdict exists to protect the jury deliberation process).

There is no evidence that any party objected to the comments made by the magistrate before the jury was sent back for further deliberations, or that any party requested the magistrate to give the jury additional instructions on what it was required to do. In fact, although the bench conference was not recorded, Thomas' counsel disclosed at oral argument that counsel for the parties both agreed that the magistrate should tell the jury only that the verdict was not complete. As such, the magistrate's failure to further clarify the situation is a basis for reversal only if plain error exists. *See Rowe International, Inc. v. J-B Enterprises, Inc.,*

647 F.2d 830, 835 (8th Cir. 1981). *See also Saunders v. Chatham County Board of Commissioners*, 728 F.2d 1367, 1368-69 (11th Cir. 1984). Here, the verdict forms were explicit and uncomplicated and each form was clearly limited to a particular defendant. Further, the jury foreperson seemed to have no question as to what the problem with the jury's verdict was, or as to what was needed to be done to make it complete. *See ante* at 5-6 (discussion between foreperson and magistrate). Clearly, the magistrate's failure to clarify what was apparently an unambiguous situation can hardly be deemed plain error. Accordingly, we conclude that the mere possibility that the jury was confused when it returned its final verdict does not warrant any action by this court.

3. Apportionment of Actual Damages

The verdict forms submitted by the trial court permitted the jury to apportion the actual damages amongst the defendants. It could reasonably be argued that the resulting apportionment of actual damages was improper because the defendants should share joint and several liability for the actual damages incurred by Thomas.

However, no objection to the verdict forms or to the lack of an instruction on apportionment of actual damages was raised at trial. Nor did the parties contest the apportionment of actual damages at any other stage of the trial or on appeal. When the issue was raised by a member of this court at oral argument, counsel for both parties had no complaint with the apportionment of actual damages in this case and, in fact, defended the apportionment. As such, the plain error doctrine is applicable to this issue.

When the parties to a case are satisfied with an issue and no other parties are affected, we should be especially hesitant to correct any error which may have been committed. Here, if the apportionment of actual damages was an error, there would be only two ways to correct the error. First, we could amend the

judgment against Booker and Humphrey to make them jointly and severally liable for some amount of actual damages. *See* 28 U.S.C. §2106. Second, we could remand for a new trial.

Neither method is particularly desirable. The first would require us to speculate as to the proper amount of actual damages to award. For example, if we were to award $5,000, we would have to speculate that the jury's final verdict awarding separate amounts of actual damages against each of the three defendants ($3,000 against Booker, $1,000 against Humphrey, and $1,000 against Lark) was in fact an apportionment of Thomas' total actual damages of $5,000. *See Smith v. Updegraff, supra,* 744 F.2d at 1367-68. The second would lead to more delay and expense to settle a matter which the parties are comfortable with. In light of these choices, we find that any error which may have been committed in apportioning Thomas' actual damages was not plain error. *See Cleavinger v. Saxner,* ____ U.S. ____, 106 S.Ct. 496, 499 (1985) (Supreme Court affirmed jury verdict which apportioned compensatory damages amongst members of prison disciplinary committee who were held liable for violating prisoners' due process rights; issue of apportionment neither raised nor discussed).

4. Attorneys' Fees

The trial court awarded Thomas an attorneys' fees award of $15,000 against the three defendants. The defendants contend that the award was improper because the award exceeded the amount recoverable by Thomas' attorney under a contingent-fee contract. This court, however, has previously held that a contingent-fee contract does not set a ceiling on the amount of attorneys' fees awardable in a section 1983 action. *Sisco v. J.S. Alberici Construction Co.,* 733 F.2d 55, 57 (8th Cir. 1984).

A remand on the matter of attorneys' fees is required, however, to determine whether our resolution of this case (notably, our reversal of the damage award against Lark and our reinstatement of the jury verdict awarding punitive damages

against Humphrey) requires a modification of the fee award. In addition, we reverse the attorneys' fee award against Lark because Thomas has not prevailed against him. *See Kentucky v. Graham*, ____ U.S. ____, 105 S.Ct. 3099, 3105 (1985) ("where a defendant has not been prevailed against * * * §1988 does not authorize a fee award against that defendant.").

CONCLUSION

We affirm the judgment against Booker and Humphrey but reverse the trial court's JNOV to the extent that it set aside the $10,000 punitive damage award against Humphrey. We also reverse the judgment awarding damages against Lark and the award of attorneys' fees against Lark. Finally, we remand for a reconsideration of the attorneys' fee award against Booker and Humphrey.

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

I concur in much of the majority's decision. I join the majority's decision to (1) affirm the judgment holding defendants Booker and Humphrey liable for actual damages and awarding $10,000 in punitive damages against Booker, (2) reverse the grant of judgment notwithstanding the verdict (jnov) to the extent that it set aside the award of $10,000 in punitive damages against Humphrey, (3) reverse the judgment awarding actual damages against defendant Lark and affirm the jnov in favor of Lark for punitive damages because of insufficient evidence. Finally, I agree that a remand for modification of the award of attorney's fees is required.

However, I believe the award of actual damages reflects an improper attempt on the part of the jury to apportion compensatory or actual damages among the defendants and, accordingly, I dissent from the majority's decision to affirm the award of actual damages against Booker and Humphrey. I would vacate the award of actual damages and remand the case to the magistrate for a new trial on the issue of actual damages only.

With respect to Instruction No. 7, I agree that the failure to use the term "reckless disregard" was not plain error. Slip op. at 11. As was noted by the majority panel opinion,

> [b]y including in Instruction No. 7 the words "gross negligence," defined as "a callous indifference or thoughtless disregard," and "egregious failure to protect," defined as "a flagrant or remarkably bad failure to protect," the trial court sufficiently indicated to the jury the nature of conduct for which defendants could be held liable.

Thomas v. Booker, 762 F.2d 654, 657 (8th Cir. 1985).

In addition, I would note, as did the majority panel opinion, that Instruction No. 7 improperly referred to the eighth amendment's prohibition against cruel and unusual punishment and thus subjected plaintiff Thomas to an erroneous standard of proof. *Id.* at 658, *citing Putnam v. Gerloff,* 639 F.2d 415, 418 (8th Cir. 1981). As noted by the majority panel opinion, 762 F.2d at 657, and the majority en banc, slip op. at 9 & n.3, Instruction No. 7 was "virtually identical" to the instruction given and found not prejudicially erroneous by this court in *Wade v. Haynes,* 663 F.2d 778, 782 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade,* 461 U.S. 30 (1983). However, the plaintiff in *Wade v. Haynes* was a convicted prisoner; at the time of the incidents in question, Thomas was being held in the city jail as a pretrial detainee. The due process clause of the fourteenth amendment rather than the eighth amendment should have been relied upon to evaluate Thomas' claim as a pretrial detainee. *Bell v. Wolfish,* 441 U.S. 520, 535 n.16 (1979), *citing Ingraham v. Wright,* 430 U.S. 651, 671-72 n.40 (1977). The relevant inquiry under the due process clause was whether the defendants' treatment of Thomas amounted to punishment, *Bell v. Wolfish,* 444 U.S. at 535, and the jury should have been instructed accordingly. *See Putnam v. Gerloff,* 639 f.2d at 420. The magistrate should not have given the *Wade v. Haynes* instruction in the present case without ap-

propriate modification. Because the jury found in favor of Thomas under the more demanding eighth amendment standard of proof, however, this error was harmless. *See Thomas v. Booker,* 762 F.2d at 658; *Putnam v. Gerloff,* 639 F.2d at 419 & n.2 (plain error).

I agree with the majority opinion's analysis of the magistrate's rulings on the defendants' motions for jnov. Slip op. at 11-13. When viewed in the light most favorable to Thomas, the evidence was sufficient to support the jury's verdict against Booker and Humphrey for actual and punitive damages but insufficient to support the verdict against Lark for both actual and punitive damages.

However, the final jury verdict awarding actual damages ($3,000 against Booker, $1,000 against Humphrey and $1,000 against Lark) reflects an improper attempt on the part of the jury to apportion actual damages among the defendants. The initial verdict, as indicated on the verdict form returned in favor of Thomas and against Booker, awarded Thomas $5,000 in actual damages; the final verdict, as indicated on three verdict forms returned in favor of Thomas and against each defendant, awarded Thomas a total of $5,000 actual damages but erroneously apportioned the award among the three defendants.[1]

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[1] The incidence of confusing jury verdicts involving multiple defendants and actual and punitive damages might be reduced if the parties and the trial courts used more carefully drafted verdict forms. For example, Missouri Approved Jury Instructions §36.12 (2d ed. 1969) suggested the following:

> If you find the issues in favor of plaintiff and find that plaintiff is entitled to actual damages only, your verdict may be in the following form: "We, the jury, find the issues in favor of plaintiff and against defendants (here insert the names of defendants against whom you find) and we assess plaintiff's damage at $____ (stating the amount).
>
> If you find for plaintiff and against one or more defendants and if you further find that plaintiff is also entitled to punitive

The injury or damage in the present case was indivisible, and defendants Booker and Humphrey were joint and severally liable for actual damages. *See generally* Restatement (Second) of Torts §§ 433, 433A & comment i, 433B (1965); *cf. Smith v. Updegraff,* 744 F.2d 1354, 1365 (8th Cir. 1984) (joint and several liability of co-conspirators); *Mitchell v. Volkswagenwerk, AG,* 669 F.2d 1199, 1203 (8th Cir. 1982) ("second collision").

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damages, then your award of punitive damages shall be in the following form: We, the jury, find the issues in favor of plaintiff and we find that plaintiff is entitled to punitive damages against the following defendants in the following amounts:

(name of defendant)	(amount of punitive damages assessed)

Missouri Approved Jury Instructions §36.12 (3d ed. 1981) (footnotes omitted) suggested the following revised verdict form:

> On the claim of plaintiff (state the name) for personal injuries against defendant (state the name of one defendant), we, the undersigned jurors, find in favor of: (state name of plaintiff or defendant).
>
> On the claim of plaintiff (state the name) for personal injuries against defendant (state the name of the other defendant), we, the undersigned jurors, find in favor of: (state name of plaintiff or defendant).
>
> Note: Complete the following paragraph only if one or more of the above findings is in favor of plaintiff (state the name).
>
> We, the undersigned jurors, assess the damages of plaintiff (state the name) as follows:
>
> For actual damages 1_____ (stating the amount).
>
> For punitive damages against defendant (state the name) $_____ (stating the amount or, if none, write the word, "none").
>
> For punitive damages against defendant (state the name) $_____ (stating the amount or, if none, write the word, "none").

Given the jury's final verdict and the dismissal of Lark on appeal, one can only speculate whether the jury intended to award Thomas $5,000 or perhaps only $4,000 in actual damages. For this reason, I would vacate the award of actual damages and remand for a new trial on the issue of actual damages only. In my view the issue of actual damages is sufficiently separate and distinct from the issues of liability for actual and punitive damages and the amount of punitive damages that, under the totality of the circumstances, a new trial on all the issues is not required.

BOWMAN, Circuit Judge, dissenting.

Thomas complains that he was deprived of his liberty interest in personal security without due process of law in violation of the due process clause of the Fourteenth Amendment. The gist of his complaint is that defendants failed to take adequate steps to address his expressed concern regarding his personal safety while he was being detained prior to trial. *Cf. Ingraham v. Wright,* 430 U.S. 651, 672, 673 (1977). A violation of substantive rights under the due process clause requires a violation of one of the "specific protections defined in the Bill of Rights," *Daniels v. Williams,* 54 U.S.L.W. 4090, 4093 (U.S. Jan. 21, 1986) (Stevens, J., concurring), or "conduct that shocks the conscience." *Rochin v. California,* 342 U.S. 165, 172 (1952). No violation of specific Bill of Rights protections is at issue. Since I do not perceive that the complaint raises any questions as to whether defendants conduct was "shocking" nor does the trial record reflect any such theory, Thomas's claim must be one of procedural due process. *Cf. Davidson v. Cannon,* 54 U.S.L.W. 4095, 4096 (U.S. Jan. 21, 1986). Thomas's claim was submitted to the jury under a "gross negligence" or "egregious failure to protect" standard and thus survives *Daniels* and *Davidson,* which hold that the due process clause is not implicated by the mere negligence of an official which causes injury to life, liberty, or property. *Daniels,* 54 U.S.L.W. at 4090; *Davidson,* 54 U.S.L.W. at 4095-96.

Our Circuit has not directly addressed the issue of whether *Parratt v. Taylor,* 451 U.S. 527 (1981), applies to procedural due process claims based on deprivations of liberty as well as to those based on deprivations of property. In *Parratt,* the Supreme Court held that "takings of property without any predeprivation process" are permissible under the due process clause of the Fourteenth Amendment when the loss is the "result of a random and unauthorized act by a state employee" rather than "a result of some established state procedure." 451 U.S. at 541. The Court noted that "[i]t is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." *Id.* The Court found that the availability of a meaningful post-deprivation hearing satisfied the requirements of procedural due process because there were state remedies that could have fully compensated the plaintiff, even though those remedies may not have been as extensive as the remedies available under section 1983. *Id.* at 537-44.

In the present case, the conduct complained of by Thomas is not conduct that is pursuant to established state procedures; it is conduct that is clearly "random and unauthorized." *Parratt,* 451 U.S. at 541; *see Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 436 (1982). As the Supreme Court made clear in *Hudson v. Palmer,* the "controlling inquiry" under *Parratt* "is solely whether the state is in a position to provide for predeprivation process." 104 S.Ct. 3194, 3204 (1984). In my view, there is no logical reason to restrict the application of *Parratt* to property deprivations.

Since a state is in no better position to anticipate random or unauthorized deprivations of liberty than it is of property, I believe that the rationale of *Parratt* extends to cases of liberty deprivations. The decisions of the majorety of other circuits that have considered this question support this conclusion. *See Toney-El v. Franzen,* 777 F.2d 1224, 1227-28 (7th Cir. 1985) ("In section 1983 actions challenging the mistakes made by state employees rather than the state procedures by which these mistakes were made, *Parratt* requires a court ' "to consider the

adequacy and availability of remedies under state law before concluding a deprivation of life, liberty, or property violates due process of law' . . . ."); *Wilson v. Beebe,* 770 F.2d 578, 584 (6th Cir. 1985) (en banc) (nothing in *Parratt* justifies different treatment of due process claims for deprivation of liberty); *Daniels v. Williams,* 748 F.2d 229, 232 (4th Cir. 1984) (en banc) (deprivation of liberty not actionable under section 1983 because post-deprivation remedy available in state courts), *aff'd on other grounds,* 54 U.S.L.W. 4090 (U.S. Jan. 21, 1986); *cf. Daniels,* 54 U.S.L.W. at 4092 & n.1 (Court need not decide whether state remedy is inadequate for deprivation of liberty interest because official's conduct was merely negligent and therefore not actionable under § 1983); *Patterson v. Coughlin,* 761 F.2d 886, 890 (2d Cir. 1985) (liberty deprivations require procedural safeguards "at least equal" to those necessary regarding deprivations of property; *Parratt* not applicable becaue deprivation not "random and unauthorized"); *Mills v. Smith,* 656 F.2d 337, 340 n.2 (8th Cir. 1981) (per curiam) (*Parratt* cited in deprivation of liberty case). *But see Brewer v. Blackwell,* 692 F.2d 387, 394-95 & 395 n.11 (5th Cir. 1982) (*Parratt* not applicable to deprivations of liberty). *See also Haygood v. Younger,* 769 F.2d 1350, 1356 (9th Cir. 1985) (en banc) (Ninth Circuit "has not spoken with one voice on whether the taking of liberty demands inherently greater process than the taking of property").

Seeing no principled basis for applying *Parratt* to property interests but not to liberty interests, I believe that to determine whether Thomas's section 1983 claim is cognizable in federal court we must ascertain whether he has adequate post-deprivation remedies under state law. *Cf. Hudson,* 104 S.Ct. at 3204. Because this matter has not been addressed by the District Court, I would remand to the District Court with directions to determine whether Thomas has an adequate remedy under state law. If he does, I believe that he is barred from bringing his action in federal court because the deprivation of his liberty interest then would not have been without due process of law. An

adequate state remedy being available, there would be no violation of procedural due process under the Fourteenth Amendment and no predicate act upon which Thomas could base his section 1983 claim. In that event, Thomas's claim would have to be dismissed since under *Parratt* the federal courts would be without subject matter jurisdiction to hear it. The *Parratt* issue is a very significant one, and I believe our Court should take this occasion, while we are sitting en banc in a case that raises the issue, to address it. I would hold that *Parratt* applies to this case and that a remand is required.

Assuming *arguendo* that *Parratt* does not bar the prosecution of this case in federal court either because *Parratt* does not apply to deprivations of liberty interests or because Thomas does not have an adequate state remedy, I dissent from the Court's decision with respect to Humphrey, and concur in the Court's decision to affirm the judgment awarding actual and punitive damages against Booker and to reverse the judgment and award of attorneys' fees against Lark.

The jury initially returned to the courtroom after its deliberations having awarded Thomas $5,000 actual damages and $25,000 punitive damages on a verdict form designating defendant Booker and having left blank the two verdict forms designating Lark and Humphrey. After the magistrate discussed the situation off the record with the attorneys, the following exchange took place:

> THE COURT: I can only say this, Miss MacMillan, and I'll speak to you as the foreperson of the jury, it's incomplete.
>
> THE FOREPERSON: You're right, we're just realizing that sitting here. I'm sorry.
>
> THE COURT: You want to take it back and finish it for me?
>
> THE FOREPERSON: Yes, I sure will.

Trial Transcript at 80-81.

The jury retired and returned some eight minutes later having completed all three verdict forms. Thomas again was awarded $5,000 actual damages, but the actual damage award now had been apportioned by the jury among all three defendants—$3,000 against Booker, $1,000 against Lark, and $1,000 against Humphrey. Likewise, Thomas again was awarded $25,000 punitive damages—$10,000 against Booker, $5,000 againt Lark, and $10,000 against Humphrey.

In setting aside the punitive damage awards against Lark and Humphrey, the trial court evaluated the unusual circumstances surrounding the final verdict returned by the jury, and found that it "could reasonably infer that the jury meant only to award damages against Booker and when told their verdict was incomplete, they simply redistributed their original award . . . ." *Thomas v. Booker,* No. 80-1297C(2) (E.D. Mo. Oct. 14, 1983) (memorandum opinion of magistrate).

The first verdict form succintly stated in its body "we find in favor of plaintiff George Thomas against defendant Thomas Booker," and made no mention of defendants Lark and Humphrey. The trial court made the specific finding, noted above, that the jury intended only to award damages against Booker, not against Lark and Humphrey. The trial court made this finding based on its colloquy with the jury and upon its observations of the jury's actions. The finding is indisputably a finding of fact and it is not clearly erroneous. *See Anderson v. City of Bessemer City,* 105 S. Ct. 1504, 1512 (1985). Because the jury reported its verdict and found only Booker liable, I believe it was plain error for the trial court to send the jury back for further deliberations against Lark and Humphrey. It seems clear to me that the jury's subsequent verdict extending liability to Lark and Humphrey was prejudiced by the manner in which the trial court directed the jury to "take it back and finish it for me." To a jury that already had rendered its verdict and thought it had completed its work, the trial court's cryptic insistence that they

return to the jury room for further deliberations could easily have been understood as a directive that, having found Booker liable, they also must find Lark and Humphrey liable.[1]

Lark escapes libility, despite the trial court's error, because our Court now holds that the evidence was insufficient as to him. As to Humphrey, however, the Court has found the evidence of liability sufficient to make a submissible case. Although I do not disagree with that conclusion, it does seem to me that the sufficiency question goes Thomas's way by only the slimmest of margins. In view of the problem of jury confusion resulting from the trial court's error, I do not believe it can be said with any reasonable degree of confidence that the jury made an unprejudiced and clear-cut determination that the evidence concerning Humphrey, barely sufficient to make a submissible case under the "gross negligence" or "egregious failure to protect" standard, was to be taken as establishing his liability. That being so, it follows that today's decision creates the substantial risk of a miscarriage of justice as to Humphrey. To avoid that substantial risk, I would affirm the judgment of the trial court setting aside the jury's award of punitive damages against Humphrey, reverse the judgment of the trial court sustaining the jury's award of actual damages against Humphrey, and remand the case for a new trial on Thomas's claims against Humphrey for actual and punitive damages.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[1] Of course, a few words by the trial court to the jury, making it clear that their having found Booker liable did not require them to find Lark and Humphrey liable, and that they must consider the evidence and the instructions as to each of the latter two defendants individually, would have avoided the problem. The mistake was not in sending the jury back to finish their work, but in the manner in which this was done.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos 83-2540/2541/2573-EM

George Thomas,
Appellee/Cross Appellant,

v.

Thomas Booker, et al.,
Appellants/Cross Appellees.

Appeals from the United States
District Court for the
Eastern District of Missouri

The petition for rehearing filed by Thomas is denied. The petition for rehearing and rehearing en banc filed by Booker and Humphrey is hereby denied. The Court, on its own motion, has granted rehearing en banc. The en banc hearing is scheduled for August 20, 1985 at 1:30 p.m. in St. Louis, Missouri.

August 7, 1985

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83-2540, 83-2541, 83-2573

George Thomas,
Appellee,

v.

Thomas Booker, Alfonso Lark
and Major C. O. Humphrey,
Appellants.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: June 11, 1984

Filed: May 16, 1985

Before ROSS, Circuit Judge, HENLEY, Senior Circuit Judge, BOWMAN, Circuit Judge.

BOWMAN, Circuit Judge.

George Thomas sued St. Louis City Jail officials Thomas Booker, Alphonso Lark, and William Humphrey under 42 U.S.C. § 1983, alleging that while he was a pretrial detainee at the jail, his constitutional right to be adequately protected from physical assaults by other inmates was violated.

I. Facts

In May 1980, Thomas was transferred to the St. Louis City Jail from the city workhouse to await trial on state charges. In-

itially, Thomas was assigned to a one-man cell in the administrative segregation section of the jail. He subsequently was assigned to a general population section of the jail. In July 1980, after a homemade knife was found in Thomas's cell, Thomas was placed in disciplinary segregation for ten days. Upon release from disciplinary segregation, Thomas was assigned to a four-man cell in a general population section of the jail.

On September 17, 1980, as inmates were being locked into their cells for the night, inmate Gregory Swink rushed into Thomas's cell, struck Thomas in the right eye, and ran to his nearby cell. Thomas immediately was taken to the city hospital for treatment of injury to his eye. Thomas was returned to the same four-man cell in the jail on September 18, 1980.

On the morning of September 22, 1980, a number of inmates, including Thomas and his cellmates, were in a dayroom located on the same floor of the jail as their cells. A fight ensued between Thomas and cellmate Gillian. Sometime after the fight had ended, defendant Humphrey entered the dayroom. Observing facial injuries to both Thomas and Gillian, Humphrey removed the two inmates from the dayroom and took them to the jail nurse's office for treatment. On September 23, 1980, Thomas was taken to the hospital and was treated for injuries he apparently sustained in the September 22 fight—a broken hand and additional injury to his right eye.

By consent of the parties, the jury trial in this case was held before a magistrate in accordance with 28 U.S.C. § 636(c).[1] The

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[1] Defendants now argue that § 636(c) unconstitutionally vests in magistrates power that is reserved under Article III of the United States Constitution and, therefore, that this case must be remanded to an Article III court. Subsequent to briefing and argument of the present case, this Court determined en banc that § 636(c) is constitutional. *Lehman Brothers Kuhn Loeb Incorporated v. Clark Oil & Refining Corporation*, 739 F.2d 1313 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 906 (1985). The position taken by defendants thus has been rejected.

jury initially returned to the courtroom after its deliberations having awarded Thomas $5,000 actual damages and $25,000 punitive damages on a verdict form designating defendant Booker and having left blank the two verdict forms designating defendants Lark and Humphrey. The following exchange then took place:

(Discussion was had off the record)

THE COURT: I can only say this, Miss MacMillan, and I'll speak to you as the foreperson of the jury, it's incomplete.

THE FOREPERSON: You're right, we're just realizing that sitting here. I'm sorry.

THE COURT: You want to take it back and finish it for me?

THE FOREPERSON: Yes, I sure will.

Trial Transcript at 80-81.

The jury retired and returned some eight minutes later having completed all three verdict forms. Thomas again was awarded $5,000 actual damages but the actual damage award had been apportioned by the jury among all three defendants—$3,000 against Booker, $1,000 against Lark, and $1,000 against Humphrey. Likewise, Thomas again was awarded $25,000 punitive damages—$10,0000 against Booker, $5,000 against Lark, and $10,000 against Humphrey.

Defendants moved the trial court for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court (1) upheld the actual and punitive damage awards against Booker, as well as the actual damage awards against Lark and Humphrey; (2) set aside the punitive damage awards against Lark and Humphrey; and (3) refused to grant a new trial. Defendants appealed arguing that the trial court either should

have granted their motion for judgment notwithstanding the verdict in its enitrety or ordered a new trial. Defendants also challenge the trial court's award of attorney's fees to Thomas. Thomas cross-appealed arguing that the trial court's partial grant of defendants' motion for judgment notwithstanding the verdict was erroneous.

II. Substantive Liability

"[P]rison officials may be liable where they are 'deliberately indifferent to [a prisoner's] constitutional rights, either because they actually intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates.' " *Martin v. White,* 742 F.2d 469, 474 (8th Cir. 1984) (quoting *Branchcomb v. Brewer,* 669 F.2d 1297, 1298 (8th Cir. 1982)). And "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. 30, 56 (1983).

The "reckless disregard" and "reckless or callous indifference" portions of these standards are applicable to this case. Defendants argue that the instructions given by trial court failed to state correctly the proper legal standards and that even if the jury was correctly instructed, the evidence is insufficient to support verdicts against them.

A. Instruction No. 7

The trial court instructed the jury that:

> Your verdict must be for Plaintiff if you believe:
>
> FIRST: Defendants knew or should have known that placing inmates in the general population and not providing close supervision made it highly foreseeable that some inmates, and in particular the Plaintiff George

> Thomas, would be physically attacked and seriously injured, and
>
> SECOND: Defendants' conduct was grossly negligent or an egregious failure to protect the plaintiff George Thomas, and
>
> THIRD: Such acts of defendants were done under the color of law of the State of Missouri, and
>
> FOURTH: Such acts violated Plaintiff's Constitutional right to be free from cruel and unusual punishment.
>
> FIFTH: As a direct result of such conduct, the plaintiff suffered injury.
>
> Gross negligence as used in this instruction means a callous indifference or thoughtless disregard for the consequences of one's acts or failure to act.
>
> Egregious failure to protect means a flagrant or remarkably bad failure to protect.

Instruction No. 7, Appendix at 105. Before discussing defendants' challenge to Instruction No. 7, we feel obliged to share some observations of our own regarding that instruction.

Instruction No. 7 is virtually identical to an instruction previously found by this Court to be not prejudicially erroneous.[2] *See Wade v. Haynes,* 663 F.2d 778, 782 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade,* 461 U.S. 30 (1983). Subsequent to *Wade v. Haynes,* the Court determined that a defendant's conduct in cases such as the instant case should be evaluated in terms of "reckless disregard." *See supra* pp. 4-5. Yet the precise term "reckless disregard" does

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[2] A holding that an instruction was not prejudicially erroneous is not necessarily tantamount to a holding that the instruction is an ideal model for future instructions.

not appear in Instruction No. 7. While the trial court might artfully have updated the language of its instruction to reflect the relevant statements of law made by this Court, we find that the failure to do so was, at worst, harmless error. By including in Instruction No. 7 the words "gross negligence," defined as "a callous indifference or thoughtless disregard," and "egregious failure to protect," defined as "a flagrant or remarkably bad failure to protect," the trial court sufficiently indicated to the jury the nature of conduct for which defendants could be held liable.

Another error in Instruction No. 7 is not, however, so easily excused. The constitutional rights of a prisoner who has been convicted of a crime are protected by the Eighth Amendment prohibition against cruel and unusual punishment. A pretrial detainee's constitutional rights are secured by the Fourteenth Amendment and "a detainee *may not be punished* prior to an ajudication of guilt in accordance with due process of law." *Putnam v. Gerloff,* 639 F.2d 415, 419 (8th Cir. 1981) (emphasis added) (citing *Bell v. Wolfish,* 441 U.S. 520, 535 (1979)). Thus, a reference to cruel and unusual punishment in paragraph four of Instruction No. 7 subjected Thomas to an erroneous burden of proof. *See id.* at 418. Had Thomas not prevailed before the jury, the trial court's requirement of a finding that defendants' acts violated Thomas's right to be free from cruel and unusual punishment would have been grounds for reversal.

Defendants challenge the first paragraph of Instruction No. 7 which conditioned defendants' liability on a finding by the jury that defendants knew or should have known that placing Thomas in the jail's general population without close supervision made an attack upon him highly foreseeable. Defendants argue that this portion of Instruction No. 7 was inadequate and that a proper instruction would preclude liability unless defendants "knew or should have known of a specific, clear and present danger to the safety of [Thomas], a danger manifested by evidence of objective facts and circumstances which should

have led [them], in the exercise of professional judgment, to act in certain ways." Brief of Appellants at 31. Defendants do not cite any authority in support of such an instruction. Moreover, we are not convinced that defendants' proposal correctly states the controlling law in a manner that would aid the jury.

B. Sufficiency of the Evidence

1. Defendants Booker and Lark

During the period relevant to this case, defendant Booker was the chief of security at the jail. Defendant Lark was the ranking supervisor of correctional officers. The chain of command included Booker, Lark, a supervisory correctional officer on each floor of the jail, and various subordinate correctional officers on each of the floors. The crux of Thomas's claims against Booker and Lark is that he asked them to be placed in administrative segregation because he feared being attacked by other inmates, that they ignored these requests, and that he subsequently suffered injurious attacks. *See* Brief of Appellee/Cross-Appellant at 17. Booker and Lark argue that the evidence is insufficient to support a finding that they acted in reckless disregard of Thomas's rights and that the verdicts against them therefore must be reversed.

With respect to Booker, the record includes testimony by Thomas (1) that in May 1980, he asked Booker not to remove him from administrative segregation (where he initially had been placed upon his transfer to the jail from the city workhouse) because he feared other inmates might attack him; (2) that in July 1980, following the discovery in Thomas's cell of a homemade knife, he told the investigating committee of which Booker was a member that he felt he needed the weapon for protection; (3) that while he was in disciplinary segregation as punishment for the homemade knife incident, he told Booker that he feared for his physical safety if he was returned to the general population; (4) that the day after his return to the jail from the hospital where he had been treated for injuries suf-

fered in the September 17, 1980 attack by Swink, he again expressed his fear of attack by other inmates and asked Booker to remove him from the general population. Thomas also testified that, following the September 17, 1980 attack by Swink but preceding his September 22, 1980 fight with Gillian, he specifically asked Booker to move him away from cellmate Parker. The record can be read to indicate that it was Parker who instigated the fight between Thomas and Gillian. Additionally, other inmates testified that they heard Thomas ask Booker to remove him from the general population. Parker testified that he told Booker if Booker didn't move Thomas, Thomas was going to be "chased" off the floor. Finally, there is every indication in the record that although classification of inmates for cell assignment purposes generally was handled by a social services office and not by Booker,[3] Booker had complete authority to move a prisoner for security reasons.

The sufficiency of the evidence supporting a verdict against Booker is a very close question. We doubt that the evidence which relates to events up to and including the September 17, 1980 attack by Swink would be sufficient, without more, to support such a verdict. But Thomas continued to express his fear of attack by other inmates even after Swink had been removed from the jail, and he did so with some degree of particularity; he identified Parker, who claims to have made threats against Thomas to Booker and who appears to have been in some way responsible for the September 22, 1980 fight between Thomas and Gillian, as an inmate he feared. Thus, when all of the evidence is viewed in the light most favorable to sustaining the jury's verdict and when Thomas is given the benefit of every reasonable inference which may be drawn from the evidence, *Bauer v. Norris,* 713 F.2d 408 (8th Cir. 1983), we are unable to say as a matter of law that the jury, having assessed the

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[3] We have considered and found to be without merit a claim by Thomas that his cell assignments were made on the basis of an improper inmate classification.

credibility of the witnesses and having resolved factual conflicts in the evidence, could not properly conclude that Booker acted in reckless disregard of Thomas's right to be free from violent attack by other inmates.

With respect to Lark, Thomas's testimony establishes that he only spoke with Lark about his fear of attack by other inmates in the jail's general population on one occasion, and then only in a very generalized fashion. Lark told him that he should discuss his concerns with Booker, who was in charge of security. This conversation took place before Thomas ever was assigned to a general population cell; at the time, Thomas was in administrative segregation following his transfer to the jail from the city workhouse. There is nothing in the record to indicate that Lark knew of Thomas's subsequent complaints to Booker, of the September 17, 1980 attack by Swink, or of Parker's threats against Thomas.

Unlike the evidence pertaining to Booker, the evidence pertaining to Lark does not present a close question of sufficiency. This evidence cannot be viewed as a sufficient basis for concluding that Lark acted in reckless disregard of Thomas's right to be free from violent attack by other inmates. We therefore hold as a matter of law that the verdict against Lark lacks adequate evidentiary support.

2. Defendant Humphrey

During the period relevant to this case, defendant Humphrey was a correctional officer at the jail. Humphrey's duties included making regular rounds of assigned areas in the jail. Thomas's claims against Humphrey are based on a different theory than his claims against Booker and Lark; Thomas alleges that Humphrey failed to make his scheduled rounds, that the September 22, 1980 fight with Gillian therefore went undetected, and that, as a result, he suffered physical injury. *See* Brief of Appellee/Cross-Appellant at 17. Humphrey disputes Thomas's allegations concerning his failure to make rounds and argues

that even if the evidence could be viewed as proof that he failed to make rounds, it does not support a finding that he acted in reckless disregard of Thomas's right to be free from violent attacks by other inmates.

There is no dispute that Humphrey was on duty when the September 22, 1980 fight between Thomas and Gillian occurred and that the fight took place in an area of the jail to which Humphrey was assigned. It seems equally clear that guards were to make full rounds every fifteen to twenty minutes. However, little else about that fight or Humphrey's role regarding it is clear from the record. Thomas and other inmates estimated that the fight lasted anywhere from forty-five minutes to two hours and that during that time, no guard came by on rounds. Prison officials testified that it would be impossible for a fight to have gone undetected for such a long time. There was testimony by inmates that a great deal of noise was made during the fight. Prison officials testified that the amount of noise claimed by the inmates to have been gnerated by this fight surely would have attracted the attention of the guards. Thomas cites as proof of Humphrey's failure to make rounds a jail record which indicates that Humphrey left his assigned floor during his September 22, 1980 duty shift for approximately twenty-five minutes. But the jail record suggests that Humphrey did so in order to fulfill another duty function. Furthermore, Humphrey testified that even if he did leave the floor, his rounds would have been made by his supervisor.

We decline at this juncture to determine whether or not, as a matter of law, this evidence is sufficient to support a verdict against Humphrey. We express no opinion as to whether Humphrey in fact failed to make scheduled rounds or as to whether such failure, if it occurred, amounted to a reckless disregard of Thomas's right to be free from violent attacks by other inmates. Instead, we base our holding as to Thomas's claims against Humphrey on other grounds. *See infra* IV.

III. The Award of Punitive Damages

Defendants argue that it was improper to submit to the jury the issue of punitive damages. We will address this contention in the context of the damages awarded against Booker because Booker is the sole defendant against whom a judgment awarding punitive damages was entered.

Once the jury determined that Booker had acted in reckless disregard of Thomas's rights, it was required to award Thomas damages to compensate him for his loss.[4] *See Smith v. Wade,* 461 U.S. at 52. Additionally, because the reckless or callous indifference threshold for awarding punitive damages applies even where the standard of liability on the underlying claim is one of recklessness, *see id.* at 56, the jury could award punitive damages if, by exercising its "discretionary moral judgment," it determined that Booker's conduct called for "deterrence and punishment over and above that provided by compensatory awards." *Id.* at 52-54. The issue of punitive damages thus was properly submitted to the jury.

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[4] Thomas apparently has suffered a permanent loss of sight in his right eye. The record indicates that Thomas may have had visual deficiency in his right eye long before the events which are the basis for this lawsuit transpired. Additionally, based upon the evidence, it would be hard to escape the conclusion that Thomas's loss of sight was to some degree caused when Swink attacked Thomas on September 17, 1980. Certainly, Thomas could not recover against defendants for a visual impairment that existed before he was confined in the jail. And we have expressed our doubts that liability could attach based on the events up to and including the Swink incident. But, at the very least, the record supports an inference that the loss of sight in Thomas's right eye is partially attributable to the September 22, 1980 fight with Gillian and establishes that Thomas suffered a broken hand in that fight. We view whatever injuries Thomas sustained in the September 22, 1980 fight as the loss for which Thomas could be compensated once liability was determined.

IV. Confusion of the Jury

In setting aside the punitive damage awards against Lark and Humphrey, the trial court evaluated the unusual circumstances surrounding the final verdicts returned by the jury, *see supra* pp. 3-4, and found that it "could reasonably infer that the jury meant only to award damages against Booker and when told their verdict was incomplete, they simply redistributed their original award . . . ." *Thomas v. Booker,* No. 80-1297C(2) (E.D. No. Oct. 14, 1983) (memorandum opinion of magistrate). Thomas argues that "[t]he most reasonable inference is that the jury completed the first verdict form thinking it included all three defendants." Brief of Appellee/Cross-Appellant at 19-20.

The first verdict form succintly stated in its body "we find in favor of Plaintiff George Thomas against Defendant Thomas Booker," and made no mention of defendants Lark and Humphrey. Although we do not mean to say that Thomas's explanation of the jury's apparent confusion is completely implausible, we cannot say as matter of law that the jury construed such an explicit, uncomplicated verdict form as including all three defendants, especially when the jury was given that verdict form along with two others which were clearly limited to defendants Lark and Humphrey. The truth of the matter is that it is impossible now to ascertain why the jury initially failed to complete all three verdict forms. But the trial court's finding as to this matter is not clearly erroneous and, therefore, we accept it. We are puzzled, however, by the steps taken by the trial court to cure any prejudice that may have resulted from the jury confusion it found to have existed.

If the jury truly meant only to award damages against Booker, the trial court could not erase the prejudice to Lark and Humphrey merely by setting aside the punitive damage awards against them; Lark and Humphrey still would be prejudiced by the actual damage awards against them. And, the trial court made no attempt to cure possible prejudice to Thomas resulting

from the jury's apparent confusion; while the jury clearly intended to award both actual and punitive damages against Booker, if, as the trial court concluded, the jury meant only to award damages against Booker, perhaps the jury's initial award of $5,000 actual damages and $25,000 punitive damages against Booker represented its true intention.

While our holding that the evidence is insufficient as a matter of law to support a verdict against Lark obviates the need to provide relief to Lark on the ground that the jury was confused, we have made no such determination regarding Humphrey. Accordingly, to avoid possible prejudice to Humphrey as a result of jury confusion, we reverse that portion of the trial court's judgment which sustained the jury's award of actual damages against Humphrey. However, just as Humphrey deserves to be relieved of an award against him that may have been the result of jury confusion, Thomas is entitled to have his claims against Humphrey resolved by a jury that is not laboring under avoidable confusion.[5] Thus we remand this case for a new trial of Thomas's claims against Humphrey.

With respect to Thomas's claims against Booker, to avoid possible prejudice to Thomas as a result of jury confusion, we give Thomas the option of accepting the existing judgment against Booker or of electing to retry his claims against Booker in their entirety. Of course, this does not mean that we view the initial award of damages against Booker as being more appropriate than the existing award. We merely hold that the initial award may have been what the jury intended, and that we would not be prepared to set aside such an award as being excessive. *See, e.g., Bauer v. Norris,* 713 F.2d at 413-14.

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[5] Confusion on the part of the jury may well have been avoided had the trial court carefully clarified the situation before sending the jury back to complete its task.

V. Conclusion

For the reasons stated earlier in this opinion, we conditionally affirm the judgment of the trial court with respect to the award of actual and punitive damages against Booker: we remand this case to the trial court with instructions that if, within thirty days from the date this opinion is filed, Thomas notifies the trial court of his acceptance of the trial court's existing judgment as to Booker, that judgment shall be considered affirmed; if Thomas does not so accept the trial court's existing judgment as to Booker, that judgment shall be considered reversed and a new trial shall be granted on Thomas's claims against Booker for actual and punitive damages.[6] Because there is insufficient evidence to support a verdict against Lark, the judgment of the trial court setting aside the jury's award of punitive damages against Lark is affirmed and the judgment of the trial court sustaining the jury's award of actual damages against Lark is reversed. For the sole reason that the jury may have been confused, the judgment of the trial court setting aside the jury's award of punitive damages against Humphrey is affirmed, the judgment of the trial court sustaining the jury's award of actual damages against Humphrey is reversed, and this case is remanded to the trial court for a new trial on Thomas's claims against Humphrey for actual and punitive damages.

The portion of the trial court's judgment awarding attorney's fees to Thomas is vacated. Thomas has not prevailed against Lark, and is not entitled to attorney's fees against him. Thomas is not entitled to attorney's fees as against Humphrey unless he prevails in a new trial of his claims against Humphrey. Thomas has prevailed against Booker unless Thomas either (a) accepts

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[6] We caution Thomas that should be elect to risk a new trial of his claims against Booker, he will have forfeited the existing judgment for $3,000 actual damages and $10,000 punitive damages against this defendant.

the trial court's existing judgment against Booker, or (b) prevails in a new trial of his claims against Booker. Even if Thomas chooses to accept the trial court's existing judgment against Booker, the trial court must reconsider the amount of its award of attorney's fees in light of our reversal of the damage awards against Lark and Humphrey.

ROSS, Circuit Judge, dissenting.

I disagree with the majority's resolution of the "jury confusion" problem in this case, and its consequent holding as to defendants Booker and Humphrey. We need not, and should not, attempt to resolve the question of what the jury intended when it first returned with an incomplete verdict. Instead, we must look to the jury's *final verdict,* which was submitted by the jury after it returned from a second round of deliberations. At that time, the jury submitted all three verdict forms, and all three had been filled out in Thomas' favor. Absent a determination that the jury's final verdict was prejudiced by improper instructions or actions by the magistrate, or that the evidence does not support the verdict, there is no basis for tampering with the jury's final verdict in this case. *Cf. Regional Investment Co. v. Haycock,* 723 F.2d 38, 41 (8th Cir. 1983) ("We must give the jury's verdict every reasonable indulgence.")

The majority notes that the magistrate should have "carefully clarified the situation before sending the jury back to complete its task." *Ante.* at 14, n.5. That may have been the better course. Yet, there is no evidence that any party objected to the comments made by the magistrate before the jury was sent back for further deliberation, or that any party requested the magistrate to give the jury additional instructions on what it was required to do. As such, the magistrate's failure to further clarify the situation is a basis for reversal only if plain error exists. *See Rowe International, Inc. v. J-B Enterprises, Inc.,* 647 F.2d 830, 835 (8th Cir. 1981). *See also Saunders v. Chatham*

County Board of Commissioners, 728 F.2d 1367, 1369 (11th Cir. 1984). Here, as the majority points out, the verdict forms were "explicit [and] uncomplicated" and each form was clearly limited to a particular defendant. *Ante.* at 13. Further, the jury foreperson seemed to have no doubts as to what the problem with the jury's verdict was, or as to what was needed to be done to make it complete. *See ante.* at 3-4 (discussion between foreperson and magistrate). Clearly, the magistrate's failure to clarify what was apparently an unambiguous situation can hardly be deemed plain error.

Due to the majority's reliance on the "jury confusion" problem, the majority does not reach the issue of whether the evidence was sufficient to support the verdict against Humphrey. I would reach that issue, and find in favor of Thomas. The evidence, taken in the light most favorable to the jury's verdict, supports a conclusion that Humphrey knew about the fight (the fight was noisy and was estimated to have lasted anywhere from forty-five minutes to two hours), yet, in reckless disregard of the inmate's right to be free from assault, permitted it to continue. Further, since the standard for awarding punitive damages in this case is substantially the same as that for actual damages, *ante.* at 12, the jury's punitive damage award against Humphrey should be sustained notwithstanding the magistrate's JNOV.

In sum, I would affirm the jury's verdict as to Humphrey and Booker, with no new trial or option to have a new trial. I agree, however, with the majority's resolution of Lark's sufficiency of the evidence claim.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-1297C(2)

George Thomas,
Petitioner,

v.

Thomas Booker, et al.,
Defendants.

MEMORANDUM-OPINION

(Filed Oct. 13, 1983)

This matter is before the Court on defendants' motion for judgment notwithstanding the verdict or in the alternative, motion for a new trial. Plaintiff brought this action in the United States District Court pursuant to 42 U.S.C. §1983. The case was tried by a jury which returned a verdict against Plaintiff Thomas Booker in the amount of $3,000.00 actual damages and $10,000 punitive damages, and against Defendant Alphonzo Lark in the amount of $1,000.00 actual damages and $5,000.00 punitive damages, and against Defendant William Frank Humphrey in the amount of $1,000.00 actual damages and $10,000.00 punitive damages.

The Court has carefully considered the motion for a new trial filed by defendants. This motion is DENIED. The Court has reviewed the defendants' motion for judgment notwithstanding the verdict and finds merit.

After thorough consideration of the evidence produced in subject case, the Court's conclusion is that the verdict herein rendered is excessive and not supported by the evidence in the case.

The standard given trial courts in considering excessive or inadequate jury verdicts was addressed by Judge (now Justice) Blackmun in *Solomon Dehydrating Company v. Guyton,* 294 F.2d 439, 447-448 (8th Cir. 1961):

> [I]n our opinion, inadequacy or excessiveness of a verdict is basically, and should be a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is "plain injustice" or a "monstrous" or "shocking" result.

This standard has been followed in *Richardson v. Communication Workers of America,* 520 F.2d 126 (8th Cir. 1976); *Snodgrass v. Nelson,* 503 F.2d 94 (8th Cir. 1974).

The plaintiff in this case suffered a broken hand, cut on the head and additional eye injury while an inmate in the St. Louis City Jail. These injuries were the result of fights between the plaintiff and other inmates, which occurred in September of 1980. Defendant Humphrey was a correctional officer, Defendant Lark was supervisor, and Defendant Booker was chief of security at that time.

When the jury originally returned the verdict, it awarded plaintiff $5,000.00 actual and $25,000 punitive damages against Defendant Booker alone. The jurors left the verdicts for or against Defendants Lark and Humphrey unanswered. When told the verdict was incomplete, they retired. In a couple of minutes, they returned verdicts apportioning the abovementioned awards to the plaintiff as follows:

	ACTUAL	PUNITIVE
Against Booker	$3,000	$10,000
Against Lark	1,000	5,000
Against Humphrey	1,000	10,000

The Court could reasonably infer that the jury meant only to award damages against Booker and when told their verdict was incomplete, they simply redistributed their original award as indicated. The punitive damages against Booker are barely supported by the evidence. There is inadequate evidentiary support for a punitive award against either Lark or Humphrey.

Accordingly, it is this Court's opinion that the assessment of punitive damages against Defendant Lark and Defendant Humphrey should be set aside.

For the above reasons, defendants' motion for a new trial will be DENIED, and defendants' motion for judgment notwithstanding the verdict will be granted in part, and the punitive damages assessed against Defendants Lark and Humphrey will be set aside.

Dated this 14th day of October, 1983.

/s/ William S. Bahn
United States Magistrate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-1297C(2)

GEORGE THOMAS,
Plaintiff,

vs.

THOMAS BOOKER, ALPHONSO LARK,
and WILLIAM FRANK HUMPHREY,
Defendants.

ORDER
(Filed November 18, 1983)

George Thomas, petitioner, has prevailed in a case against Thomas Booker, Alphonso Lark and William Frank Humphrey. A jury rendered judgment in Thomas' favor on June 28, 1983. The Court, in its order of October 13, 1983, amended the judgment. The modified judgment allows plaintiff $3,000 actual damages and $10,000 punitive damages against Defendant Thomas Booker, $1,000 actual damages against Defendant Alphonso Lark, and $1,000 actual damages against Defendant William Frank Humphrey.

Plaintiff has filed a motion for an award of attorney's fees in the amount of $22,845.67, and for costs for the prosecution of this action in the amount of $1,212.67.

Plaintiff brought this action pursuant to 42 U.S.C. §1983, alleging that defendants' failure to segregate him from other violent inmates, resulted in an assault which cost him his right eye.

The motin for attorney's fees is somewhat unusual, because the plaintiff had agreed with his attorney as to the amount of

the fee that would be paid, with a contingency factor for successful litigation included. The agreement provided that the attorney was to receive 50% of the recovery. The ultimate recovery is $15,000.

The Eighth Circuit has adopted the guidelines of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), in its case of *Ladies Center, Nebraska, Inc. v. Thone*, 645 F.2d 645 (8th Cir. 1981).

Historically, in America, each party to a dispute has been responsible for its own attorney's fees. However, the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, allows a prevailing party to recover attorney's fees in pursuing a §1983 action. This enactment was made to encourage private attorneys to undertake enforcement of important public policies and rights contained in our civil rights laws.

Actually, absent the contingent fee contract, this Court could apply the twelve guidelines outlined in *Johnson v. Georgia Highway Express, Inc., supra,* and arrive at a judicial award of attorney's fees which will no doubt leave all parties somewhat dissatisfied.

In approaching Thomas' claim for attorney's fees, we will briefly consider the guidelines outlined in *Johnson, supra:*

(1) **Time and labor required.** Because this case was of some duration before trial, there is a claim for substantial fees, to wit, $22,845.67, for hours expended. Frankly, when we carefully weigh the hours expended with proper regard for duplication of efforts, both in preparation and in the courtroom, time in research preparation, and over participation of efforts by two lawyers in this same case, we are forced to discount the claimed amount.

(2) **The novelty and difficulty of the question.** The case was neither novel nor difficult and was a simple matter of a claim of failure to provide a safe incarceration area.

(3) **Skill of the legal services employed.** The trial attorney's work product, preparation and general ability before the Court was excellent. He actually made a relatively routine case, a very strong case.

(4) **Preclusion of other employments by the attorney.** There was no evidence that the plaintiff's attorney was barred from other activity because of this case.

(5) **The customary fee.** Plaintiff's attorney has submitted billings based upon customary fees and we do not question his fee schedule, but only question the time expended.

(6) **Whether the fee is fixed or contingent.** The plaintiff and his counsel in this case have agreed that the counsel should receive 50% of plaintiff's recovery, if any. Plaintiff's recovery was a total of $15,000; one-half of that award would be a $7,500 fee for the attorney. Despite the rule in *Johnson, supra,* at 718, that:

> In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount.

We have determined that said fees should not be limited by said contract.

Frankly, the claimed hours and the satisfaction of the other guidelines, made by plaintiff's attorney, have led us to award twice that much in fees in this particular case. We reach this conclusion in the following manner: The plaintiff has submitted a claim for attorney's fees based on an hourly rate of $75.00 for Mr. Birnbaum and $65.00 for Mr. Brodeur aggregating $22,845.67. The total number of hours submitted, however, reflect duplication of time by the attorneys in many areas. In addition, the legal issues in this case were not unique nor were they extremely difficult to research; nor did they require the presence of two attorneys at trial. Accordingly, the Court must consider the reasonableness of the time expended both in

preparation and at trial, and finds approximately $3,500 in duplication time and some $4,000 in excessive preparation time. Accordingly, the Court determines $15,000 to be a reasonable fee in the instant case.

It should be noted that the Fifth Circuit changed its posture concerning maximum attorney's fees created by a contingent fee contract in *Cooper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1097 (5th Cir. 1982), wherein it noted that a fee arrangement was not a binding limit on a reasonable fee.

We note in *Cooper v. Singer*, 689 F.2d 929 (10th Cir. 1982), it was held that an agreement between plaintiff and counsel as to the amount of the fee constitutes the maximum fee allowable under §1988. This position was reiterated in *Pharr v. Housing Authority of the City of Prichard, Alabama*, 707 F.2d 1216 (11th Cir. 1983). *Cooper* further noted that when the prevailing party and his or attorney had fairly contracted to establish a fee, the contract represents their notion of what constitutes a reasonable fee. However, at rehearing on October 24, 1983, the en banc court declared that §1983 fee awards should not be limited by contingent fee agreements. *Cooper v. Singer*, 52 L.W. 2253 (10th Cir. 1983).

We have relied also on the Supreme Court's decision in *Hensley v. Eckerhart*, 103 S.Ct. 1933 (1983). *Hensley* directs lower courts to make an initial estimate of fees based on billing rates and hours expended and then modify the product in light of the contingent nature of the lawyer's compensation in a §1983 award.

(7) **Time limitations imposed by the client or the circumstances.** There was no indication that this case interfered with plaintiff's counsel's other legal work. It proceeded in a leisurely fashion and only required concentration at trial time.

(8) **The amount involved and the results obtained.** The $15,000 award for the alleged loss of an eye is unspectacular.

(9) **The experience, reputation, and ability of the attorneys.** While the attorney involved is young and relatively inexperienced in the courtroom, his performance was exceptional as indicated in guideline No. 3.

(10) **The undesirability of the case.** There is no evidence that the case involved placed any shadow on the attorney's position in the community.

(11) **The nature and length of the professional relationship with the client.** This factor does not contribute to the determination of the fees in this case.

(12) **Awards in similar cases.** We have felt constrained to consider the guidelines factors in the *Johnson* case, since it has been adopted by this circuit, and we did use these guidelines in reaching our ultimate award of attorney's fees, which we feel was not limited by contract, but somewhat influenced thereby.

Frankly, we had hoped and we did indeed, encourage counsel on both sides to professionally agree on the settlement of this case, both as to the jury verdict and as to attorney's fees. Several months have elapsed and unfortunately, this has not been accomplished.

We note the Eighth Circuit reiterated its recognition of *Johnson v. Georgia Highway Express, Inc., supra,* in *Jacquette v. Blackhawk County, Iowa,* 710 F.2d 455 (8th Cir. 1983). The First Circuit in *Sargeant v. Sharp,* 579 F.2d 645 (1st Cir. 1978), stated that if the fee determined to be reasonable exceeds the amount the client contracted to pay, the fee award should reimburse the plaintiff for the amount he or she is obligated to pay with the excess going to counsel. We cannot escape the rationalization that when the prevailing party and his attorney have fairly contracted to establish a fee, the contract represents their notion of what constitutes a reasonable fee.

Had counsel in this case acquired a jury award in the amount of $100,000, surely he would have pressed the plaintiff for 50%

of that award, as per the contract. This would be so even though the reasonable award for attorney's fees under the circumstances might have only been $15,000. We confess that we have considered this aspect in arriving at our conclusion as to the fee award.

In view of the diverse opinions and approaches to this difficult situation, it is unrewarding to further labor the point. We have concluded that the indicated award is adequate to attract competent counsel and yet does not produce a windfall to a civil rights attorney.

Accordingly, the defendant's, Thomas Booker, Alphonso Lark and William Frank Humphrey, shall pay to the plaintiff in the primary action in the present case, reasonable attorney's fees in the amount of $15,000, based on what this Court has determined is reasonable in this area for the legal performance given by counsel on behalf of the plaintiff.

The plaintiff has also moved that the sum of $1,212.67 be taxed as costs in this case. The Court finds that taxation of these costs substantiated and appropriate pursuant to 28 U.S.C. §1920. Defendants shall pay said costs.

IT IS SO ORDERED this 18th day of November, 1983.

/s/ William S. Bahn
United States Magistrate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-1297C(2)

GEORGE THOMAS,
Petitioner,

vs.

THOMAS BOOKER, et al.,
Defendants.

ORDER
(Filed November 21, 1983)

Defendants move for relief of judgment pursuant to Rule 60(b)(4) and (6), F.R.C.P. This case was tried before a jury, which returned a verdict for the plaintiff on June 28, 1983. An order was entered October 13, 1983 granting defendants' motion for judgment not withstanding the verdict in part.

Defendants bring this motion relying on the broadest interpretation of *Pacemaker Diagnostic Clinic v. Instromedex, Inc.*, 712 F.2d 1305 (9th Cir. 1983). Said case specifically stated that the decision shall not apply to any case referred to a magistrate prior to that date, *Id.* at 1314.

Accordingly, defendants' motion for relief of judgment is DENIED.

IT IS SO ORDERED this ~~3~~1st day of October, 1983.

/s/ William S. Bahn
United States Magistrate

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-1297C(2)

GEORGE THOMAS,
Plaintiff,

vs.

THOMAS BOOKER, et al.,
Defendants.

VERDICT

We, the jury, unanimously find as follows:

On Plaintiff's claim for violation of his civil rights, we find in favor of Plaintiff George Thomas against Defendant Thomas Booker.

We, the jury assess damages of Plaintiff as follows:

For Actual Damages $3,000 (Stating amount).

For Punitive Damages $10,000 (Stating amount).

/s/ Jacqueline MacMillan
FOREPERSON

Dated:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-1297C(2)

GEORGE THOMAS,
Plaintiff,

vs.

THOMAS BOOKER, et al.,
Defendants.

VERDICT

We, the jury, unanimously find as follows:

On Plaintiff's claim for violation of his civil rights, we find in favor of Plaintiff George Thomas against Defendant Alphonso Lark.

We, the jury assess damages of Plaintiff as follows:

For Actual Damages $1,000 (Stating amount).

For Punitive Damages $5,000 (Stating amount).

/s/ Jacqueline MacMillan
FOREPERSON

Dated:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-1297C(2)

GEORGE THOMAS,
Plaintiff,

vs.

THOMAS BOOKER, et al.,
Defendants.

VERDICT

We, the jury, unanimously find as follows:

On Plaintiff's claim for violation of his civil rights, we find in favor of Plaintiff George Thomas against Defendant William Frank Humphrey.

We, the jury assess damages of Plaintiff as follows:

For Actual Damages $1,000 (Stating amount).

For Punitive Damages $10,000 (Stating amount).

/s/ Jacqueline MacMillan
FOREPERSON

Dated:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-1297C(2)

GEORGE THOMAS,
Plaintiff,

vs.

THOMAS BOOKER, et al.,
Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable William S. Bahn, United States Magistrate, presiding, and the issues having been duly tried and the jury having rendered its verdict.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiff, George Thomas, recover of the Defendant, William Frank Humphrey, the sum of $1,000.00 in actual damages and $10,000.00, in punitive damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Plaintiff, George Thomas, recover of the Defendant, Thomas Booker, the sum of $3,000.00, in acutal damages and $10,000.00, in punitive damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Plaintiff, George Thomas, recover of the Defendant, Alphonso Lark, the sum of $1,000.00, in actual damages and $5,000.00, in punitive damages. For a total judgment of THIRTY THOUSAND DOLLARS ($30,000.00), together with interest at the rate of 9.59% per annum, and the costs of this action.

Dated this 28th day of June, 1983.

EYVON MENDENHALL, CLERK
By /s/ Joan Boswell, Deputy Clerk.

APPENDIX F

U. S. Constitution

Article III

The Judicial Department

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Seventh Amendment

In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

28 U.S.C. §636(c)

(c) Notwithstanding any provision of law to the contrary —

(1) Upon the consent of the parties, a full-time United States Magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set

forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the

parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall determine, taking into account the complexity of the particular matter referred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed by the court to take a verbatim record by shorthand or by mechanical means, or by an employee of the court designated by th court to take such a verbatim record. Notwithstanding the magistrate's determination, (A) the proceedings shall be taken down by a court reporter if any party so requests, (B) the proceeding shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceeding shall be made if all parties so agree. Reporters referred to in this paragraph may be transferred for temporary service in any

district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such court.

42 U.S.C. §1988

Proceedings in Vindication of Civil Rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.